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THE LAW OF ELECTRICITY.
A TREATISE
ON THE
RULES OF LAW
RELATING TO
TELEGRAPHS, TELEPHONES,

Electric Lights, Electric Railways, and Other
Electric Appliances.

BY SEYMOUR D. THOMPSON, LL.D.

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TO THE
HON. GEORGE W. STONE, LL.D.,

CHIEF JUSTICE OF THE STATE OF ALABAMA,

THIS WORK IS INSCRIBED BY THE AUTHOR, AS A TRIBUTE TO HIS
EMINENT JUDICIAL SERVICES, EXTENDING OVER A PERIOD OF
MORE THAN FORTY YEARS: AS A TESTIMONIAL OF THE
ESTEEM IN WHICH HE IS HELD BY THE BAR OF OUR
COUNTRY: AND ALSO IN RECOGNITION OF THE
HIGH CHARACTER, PAST AND PRESENT,
OF THE COURT OVER WHICH
HE PRESIDES.

PREFACE.

This is an attempt to state and classify the adjudged law applicable to Telegraphs, Telephones, Electric Lights, Electric Railways, and other Electrical Appliances. The subject is a rapidly growing one. The decisions are multiplying with such rapidity that they have almost outrun the diligence of the author. The author acknowledges the assistance of Professor James A. Yantis, of the Law Department of the University of Missouri, who made a critical examination of a portion of his manuscript, and made valuable suggestions as to alterations and additions.

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- Western Union Tel. Co. v. Smith, 76 Tex. 253, pp. 321, 427.
- Western Union Tel. Co. v. State, 55 Tex. 314, p. 9.
- Western Union Tel. Co. v. Steele, 106 Ind. 163, pp. 183, 423.
- Western Union Tel. Co. v. Stevenson, 128 Pa. St. 443, pp. 223, 257, 464.
- Western Union Tel. Co. v. Swain, 109 Ind. 405, p. 183.
- Western Union Tel. Co. v. Taylor, 84 Ga. 408, p. 196.
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- Western Union Tel. Co. v. Ward, 23 Ind. 377, pp. 186, 188.
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- Wolfe v. Missouri Pacific R. Co., 97 Mo. 473, p. 147.
- Wolfskehl v. Western Union Tel. Co., 46 Hun (N. Y.), 502, p. 408.
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- Worster v. Proprietors, 16 Pick. (Mass.) 541, p. 112.
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CHAPTER I.

RIGHTS OF TELEGRAPH COMPANIES.

SECTION.

1. As Instruments of Interstate Commerce.
2. Provisions of the Revised Statutes of the United States.
3. Validity and Effect of this Statute in General.
4. Effect of this Statute in Exempting Telegraph Companies from State Taxation and Control.
5. Invalidity of State Statute Prescribing Priorities of Interstate Messages.
6. Limit of State Power of Taxation: Property Taxable—Interstate Business not.
7. License Tax for the Privilege of Doing Business.
8. No Exclusive Privilege of Establishing Line.
9. State Grant of Exclusive Privilege to a Particular Company.
10. Exclusive Privileges under United States Patents.
11. Right to Extend Line upon Interstate Bridge over Navigable Waters.
12. Not Allowed to Interfere with the Opening of the Draw-Span,
13. Statutory Protection of Poles and Wires.
14. Damages for Cutting Such Wires.

§ 1. As Instruments of Interstate Commerce.—
Under the Constitution of the United States Congress possesses the power to regulate commerce among the several States.¹ The present doctrine of the Supreme Court of the United States is that this grant of power to Congress excludes its exercise by the States, so that where Congress has not exercised the power its non-action is deemed equivalent to a declaration that commerce in the given

¹ Const. U. S., art. 1, § 8, cl. 3.

particular should be free.¹ So jealous is the Federal judiciary about protecting in Congress a power which that body has seldom seen fit to exercise, that it holds that every interference by the States with the instruments of interstate commerce, whether by way of regulation or taxation, except such as may fall within what is called the police power, is void. This police power is perhaps the vaguest and worst defined governmental power which exists. It is said by the Supreme Court of the United States to be the power of the State to protect the lives, limbs, health and morals of its citizens.² In short, it is the power of self-preservation. Roughly speaking, it may be said that Congress possesses none of it, and that the States possess all of it.³ This police power of the States, wherever it touches the boundaries of Federal power, or wherever it is so exerted as to raise what are termed "Federal questions," is bounded only by those conceptions of what is reasonable and just which prevail at the particular hour in the minds of the members of the highest Federal judicial tribunal. But, whatever may be its nature or extent, the authority of Congress over the regulation of

¹ Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196; Brown v. Houston, 114 U. S. 622; Pickard v. Pullman Southern Car Co., 117 U. S. 34; Wabash, etc. R. Co. v. Illinois, 118 U. S. 557; Walling v. Michigan, 116 U. S. 446; Corson v. Maryland, 120 U. S. 502; Case of the State Freight Tax, 15 Wall. (U. S.) 232; Cooley v. Port Wardens, 12 How. (U. S.) 299; Gilman v. Philadelphia, 3 Wall. (U. S.) 713; Hall v. De Cuir, 95 U. S. 485, 497; Railroad Co. v. Husen, 95 U. S. 465.

² Mugler v. Kansas, 123 U. S. 663; Butchers' Union v. Crescent City Co., 111 U. S. 746; Yick Wo v. Hopkins, 118 U. S. 356; Beer Co. v. Massachusetts, 97 U. S. 25; Fertilizing Co. v. Hyde Park, 97 U. S. 659, 669.

³ Congress indeed exercises some of the police power indirectly through the exercise of its *other powers*, as where it excludes immoral publications from the mails.

interstate commerce is paramount to it; and when the two conflict, the police power of the State must give way.¹ Except in so far as they are subject to this power on the part of the States, telegraph companies which cross the boundary line of the State are free from State regulation or taxation. They are instruments of commerce, and where they pass from one State to another, of interstate commerce; and instruments of interstate commerce can never be regulated nor taxed as such by a single State.² In pursuance of the same idea, it has been held by a State court that the Act of Congress,³ giving to any telegraph company the right to construct, etc., telegraph lines on the public lands of the United States, etc., upon evidence of acceptance of its terms under specified restrictions, etc., is a regulation of commerce, within the meaning of that clause of the United States Constitution which declares that Congress shall have the power to "regulate commerce, etc., among the several States," and supersedes State legislation on the subject.⁴

§ 2. **Provisions of the Revised Statutes of the United States.**—Several Acts of Congress, as now collected in the Revised Statutes of the United States, confer important privileges upon telegraph companies accepting their provisions, and have been the basis, in part at least, of a line of important ju-

¹ *Henderson v. New York*, 92 U. S. 259; *Chy Lung v. Freeman*, *Id.* 275; *Railroad Company v. Husen*, 95 U. S. 465; *Beer Co. v. Massachusetts*, 97 U. S. 25, 33; *Leisy v. Hardin*, 135 U. S. 100.

² *Ratterman v. Western Union Tel. Co.*, 127 U. S. 411; *s. c.*, 2 *Interstate Com. Rep.* 59; *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1; *Telegraph Co. v. Texas*, 105 U. S. 460; *Western Union Tel. Co. v. Pendleton*, 122 U. S. 347.

³ 14 U. S. Stat. at Large, 221; *post*, next section.

⁴ *Western Union Tel. Co. v. Atlantic, etc. Tel. Co.*, 5 Nev. 102.

dicial decisions exempting such companies from State taxation and control. These provisions are as follows :

“ Any telegraph company now organized, or which may hereafter be organized, under the laws of any State, shall have the right to construct, maintain and operate lines of telegraph through and over any part of the public domain of the United States, over and along any of the military or post-roads of the United States which have been or may hereafter be declared such by law, and over, under or across the navigable streams or waters of the United States ; but such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post-roads.¹

“ Any telegraph company organized under the laws of any State shall have the right to take and use from the public lands through which its lines of telegraph may pass, the necessary stone, timber, and other materials for its posts, piers, stations, and other needful uses in the construction, maintenance and operation of its lines of telegraph, and may pre-empt and use such portion of the unoccupied public lands subject to pre-emption through which their lines of telegraph may be located as may be necessary for their stations, not exceeding forty acres for each station ; but such stations shall not be within fifteen miles of each other.”²

“ The rights and privileges granted under the provisions of the Act of July twenty-four, eighteen hundred and sixty-six, entitled ‘ An act to aid in the construction of telegraph lines, and to secure to the government the use of the same for postal, military and other purposes,’ or under this title, shall not be transferred by any company acting thereunder to any other corporation, association or person.”³

“ Telegrams between the several departments of the government and their officers and agents, in their transmission over the lines of any telegraph company to which has been given the right of way, timber, or station lands from the public domain, shall have

¹ Rev. Stat. U. S. § 5263 ; Act Cong. July 24, 1866, ch. 230, § 1 ; 14 U. S. Stat. at Large, 221 ; Act Cong. Feb. 20, 1877, ch. 63 ; 19 U. S. Stat. at Large, 232.

² Rev. St. U. S. § 5264 ; Act Cong. July 24, 1866, ch. 230, § 1 ; 14 U. S. St. at Large, 221.

³ Rev. St. U. S. § 5265 ; Act Cong. July 24, 1866, ch. 230, § 3.

priority over all other business, at such rates as the Postmaster-General shall annually fix. And no part of any appropriation for the several departments of the government shall be paid to any company which neglects or refuses to transmit such telegrams in accordance with the provisions of this section."¹

"The United States may, for postal, military, or other purposes, purchase all the telegraph lines, property and effects of any or all companies acting under the provisions of the Act of July twenty-fourth, eighteen hundred and sixty-six, entitled 'An act to aid in the construction of telegraph lines, and to secure to the government the use of the same for postal, military and other purposes,' or under this title, at an appraised value, to be ascertained by five competent, disinterested persons, two of whom shall be selected by the Postmaster-General of the United States, two by the company interested, and one by the four previously selected."²

"Before any telegraph company shall exercise any of the powers or privileges conferred by law such company shall file their written acceptance with the Postmaster-General of the restrictions and obligations required by law."³

"Whenever any telegraph company, after having filed their written acceptance with the Postmaster-General of the restrictions and obligations required by the act approved July twenty-fourth, eighteen hundred and sixty-six, entitled 'An act to aid in the construction of telegraph lines, and to secure to the government the use of the same for postal, military and other purposes,' or by this title, shall by its agents or employes, refuse or neglect to transmit any such telegraphic communications as are provided for by the aforesaid act, or by this title, or by the provisions of section two hundred and twenty-one, title, 'The Department of War,' authorizing the Secretary of War to provide for taking meteorological observations at the military stations and other points of the interior of the continent, and for giving notice on the northern lakes and sea-board of the approach and force of storms, such telegraph company shall be liable to the penalty of not less than one hundred dollars, and not more than one thousand

¹ Rev. St. U. S. § 5266; Act Cong. July 24, 1866, ch. 230, § 2; 14 U. S. St. at Large, 221; Act Cong. June 1872, ch. 335, § 17; 17 U. S. St. at Large, 287; Act Cong. June 10, 1872, ch. 415, § 1; 17 U. S. St. at Large, 336, 337.

² Rev. St. U. S. § 5267; Act Cong. July 24, 1866, ch. 230, § 3; 14 U. S. St. at Large, 221; Act Cong. June, 1874, ch. 461; 18 U. S. St. at Large, 250.

³ Rev. St. U. S. § 5268; Act Cong. July 24, 1866, § 4.

dollars for each such refusal or neglect. [To be recovered by an action or actions at law in any district court of the United States.]”¹

§ 3. **Validity and Effect of this Statute in General.**—There is no doubt of the constitutional power of Congress to enact this statute.² It is a regulation of commerce among the several States, under the commerce clause of the Federal Constitution, and hence it supersedes State legislation on the subject.³ By another act of Congress “all *railroads* or parts of railroads which are now or hereafter may be in operation,” are established as post-roads of the United States.⁴ This statute, it is to be borne in mind, is enacted under a grant of power to Congress in the Federal Constitution to establish post-offices and post-roads.⁵ The privilege granted by the statute quoted in the preceding section, to telegraph companies accepting the provisions of the act, to maintain their lines, extends, it seems, to maintaining their wires along the line of an *elevated railroad* in a city, and this privilege cannot be destroyed by State legislation.⁶

§ 4. **Effect of this Statute in Exempting Telegraph Companies from State Taxation and Control.**—The

¹ Rev. St. U. S. § 5269; Act Cong. June 10, 1872, ch. 415, § 1; 17 U. S. St. at Large, 366, 367; Act Cong. Feb. 20, 1877, ch. 63; 19 U. S. St. at Large, 232; Act Cong. Feb. 27, 1877, ch. 69; 19 U. S. St. at Large, 252.

² *Pensacola Tel. Co. v. Western Union Tel. Co.*, 2 Woods (U. S.), 643; s. c., affirmed, 69 U. S. 1.

³ *Western Union Tel. Co. v. Atlantic, etc. Tel. Co.*, 5 Nev. 102; *post*, §§ 4, 8.

⁴ Rev. St. U. S. § 3964.

⁵ Const. U. S. Art. 1, § 8.

⁶ *Western Union Tel. Co. v. New York*, 3 L. R. A. 449; 2 Interstate Com. Rep. 533; 6 Rail. & Corp. L. J. 105; 38 Fed. Rep. 552. The court had such doubt of the validity of the State statute (N. Y. Act of 1887, ch. 716), that it held that an injunction against any interference with the wires should not be granted until the question could be passed upon by the court of last resort, the maintenance of wires thereon not being attended with any public inconvenience.

action taken by Congress, in the form of this statute, has had the effect at least of making such telegraph companies as should accept its provisions, agencies of the general government, if not of recognizing their character as agencies of interstate commerce. It has influenced in some degree, no doubt, the Federal judiciary in the establishment of a principle which has in a great measure lifted such companies above State taxation and State control; though without the aid of such a statute they would, under the present interpretation of the interstate commerce clause of the Federal Constitution, be removed from interstate taxation and control to the same extent and on the same principle as interstate railways. Quoting from a recent decision of the Supreme Court of the United States: "That principle is, in regard to telegraph companies which have accepted the provision of the Act of Congress of July 24, 1866, sections 5263 to 5268 of the Revised Statutes of the United States, that they shall not be taxed by the authorities of a State for any messages, or receipts arising from messages, from points within the State to points without, or from points without the State to points within, but that such taxes may be levied upon all messages carried and delivered exclusively within the State. The foundation of this principle is that messages of the former class are elements of commerce between the States and not subject to legislative control of the States, while the latter are elements of internal commerce solely within the limits and jurisdiction of the State, and, therefore, subject to its taxing power."

¹ *Western Union Tel. Co. v. Alabama State Board*, 132 U. S. 472; s. c., 10 Sup. Ct. Rep. 161 (reversing s. c., 80 Ala. 273). The following cases are quoted by the court as establishing this principle: *Pensacola Tel.*

§ 5. **Invalidity of State Statute Prescribing Priority of Interstate Messages.**—A State statute¹ prescribing that telegraph companies might arrange with publishers of newspapers for the transmission of intelligence of general and public interest out of its order, and that communications for and from officers of justice should take precedence of all others, and also requiring telegrams to be delivered by messengers to the persons to whom they were addressed, if they resided within one mile of the telegraph station, or within the city and town in which such station was—has been held, in so far as it attempted to prescribe the order and manner of delivery of telegrams in other States, in conflict with the provision of the Constitution of the United States vesting in Congress the power to regulate commerce among the States.²

§ 6. **Limit of State Power of Taxation—Property Taxable—Interstate Business not.**—The foregoing premises³ have led to the conclusion that the *property* of a telegraph company, situated within a State, may be taxed therein as all other property is taxed; but that its *business* of an interstate character cannot be taxed.⁴ In other words, the State cannot tax a telegraph company on *messages* sent, except where

Co. v. Western Union Tel. Co., 96 U. S. 1; Telegraph Co. v. Texas, 106 U. S. 460; Western Union Tel. Co. v. Massachusetts, 125 U. S. 530; Ratterman v. Western Union Tel. Co., 127 U. S. 411; Leloup v. Port of Mobile, 127 U. S. 640; Fargo v. Michigan, 131 U. S. 230; Philadelphia, etc. Steamship Co. v. Pennsylvania, 122 U. S. 326.

¹ Ind. Rev. Stat. 1881, §§ 4176, 4178.

² Western Union Tel. Co. v. Pendleton, 122 U. S. 347; 7 Sup. Ct. Rep. 1126; 36 Alb. L. J. 67.

³ *Ante*, § 4.

⁴ Leloup v. Port of Mobile, 127 U. S. 640; 12 Interstate Com. Rep. 184; Western Union Tel. Co. v. Massachusetts, 125 U. S. 530.

they are transmitted within the State;¹ but such taxes may be levied upon all messages carried and delivered exclusively within the State.² It logically follows that a *single tax*, assessed under a State statute upon the receipts of a telegraph company, derived from interstate and domestic commerce, and returned and assessed without separation and apportionment, is invalid only in proportion to the extent that such receipts were derived from interstate commerce.³ In short, the doctrine of a succession of decisions of the Supreme Court of the United States⁴ is that no tax can be imposed by State authority upon *messages*, where the communication is carried either into the State from without, or from within the State to another State.

§ 7. **License Tax for the Privilege of Doing Business.**—It has been held by several State courts that a municipal corporation may, provided it has power to do so under its charter, impose a license tax upon a foreign telegraph company having an agency, and doing business in the city, and that such a tax is constitutional.⁵ But, overruling this view, the Supreme Court of the United States has held that a

¹ *Western Union Tel. Co. v. Pennsylvania*, 128 U. S. 39; 18 Md. L. J. 744; 9 Sup. Ct. Rep. 6; 2 *Interstate Com. Rep.* 241.

² *Western Union Tel. Co. v. Alabama*, 132 U. S. 472; 10 Sup. Ct. Rep. 161.

³ *Ratterman v. Western Union Tel. Co.*, 127 U. S. 411; 2 *Interstate Com. Rep.* 59.

⁴ *Western Union Tel. Co. v. Alabama State Board*, 132 U. S. 472, 475; *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1; *Telegraph Co. v. Texas*, 105 U. S. 460; *Western Union Tel. Co. v. Massachusetts*, 125 U. S. 530; *Ratterman v. Western Union Tel. Co.*, 127 U. S. 411; *Leloup v. Port of Mobile*, 127 U. S. 640; *Fargo v. Michigan*, 121 U. S. 230; *Philadelphia, etc. Steamship Co. v. Pennsylvania*, 122 U. S. 326.

⁵ *Western Union Tel. Co. v. Richmond*, 26 Gratt. (Va.) 1; *Western Union Tel. Co. v. State*, 55 Tex. 314; *Western Union Tel. Co. v. Mayer*, 28 Ohio St. 521; *Port of Mobile v. Leloup*, 76 Ala. 401.

general license tax on such a company, doing business in different States, affects its entire business, interstate as well as domestic, and is, therefore, unconstitutional.¹

§ 8. **No Exclusive Privilege of Establishing Line.**—As elsewhere seen,² an Act of Congress gives to telegraph companies which accept its provisions the right to extend their lines along post-roads, and, as already stated, another Act of Congress designates railroads as post-roads.³ From these premises a Federal court has made the deduction that a railroad company cannot grant to a telegraph company the sole right to construct a line over the railroad company's right of way, so as to exclude other companies whose lines would not interfere with those of the first company.⁴ A statute of Texas⁵ enacts that no corporation shall contract with a land-owner for the exclusive right to maintain a telegraph line on his land. It is held that the prohibition applies to such an agreement between a railroad company and a telegraph company.⁶ The Supreme Court of Alabama holds that a contract by which a railroad company undertakes to cede to a telegraph company the exclusive privilege of constructing and maintaining its lines over the railroad company's right of way, even if otherwise valid, cannot debar the State, in the exercise of the right of eminent domain, from

¹ *Leloup v. Port of Mobile*, 127 U. S. 640 (reversing s. c., 76 Ala. 401);
² *Interstate Com. Rep.* 134. So held in *St. Louis v. Western Union Tel. Co.*, 39 Fed. Rep. 59.

³ *Ante*, § 2.

⁴ *Ante*, § 3.

⁵ *Western Union Tel. Co. v. American Union Tel. Co.*, 9 Biss. (U. S.) 72.

⁶ *Tex. Rev. Stat.*, art. 624.

⁷ *Western Union Tel. Co. v. Baltimore & Ohio Tel. Co.*, 22 Fed. Rep. 133.

authorizing the establishment of another telegraph line over the same right of way.¹

§ 9. **State Grant of Exclusive Privilege to a Particular Company.**—The Supreme Court of California has held that a statute of that State² granting to a certain corporation the exclusive privilege to construct and maintain lines of telegraph between certain points, was not unconstitutional.³ But the California court construed the question only with reference to the inhibitions of the State constitution.⁴ The Supreme Court of the United States holds that such a State statute⁵ cannot operate to exclude a foreign telegraph company, which has accepted the provisions of the Act of Congress already quoted,⁶ from constructing and operating a line of telegraph within the State, whether upon the public domain, upon military post-roads, or upon lands secured by private arrangement.⁷ The last named court holds that this Act of Congress, in so far as it declares that the erection of telegraph lines shall, as against State interference, be free to all who accept its terms and conditions, and that a telegraph company of

¹ New Orleans, etc. R. Co. v. Southern, etc. Tel. Co., 53 Ala. 211.

² Cal. Act of May 3, 1852.

³ California, etc. Tel. Co. v. Alta Tel. Co., 22 Cal. 398.

⁴ The court also held that the provision in the act, that no existing law shall be construed so as to conflict or interfere with the provisions of this act, does not repeal the general corporation law, so as to take away the right of forming corporations to build lines of telegraph between those points, but only to subject subsequent builders to the exclusive prior right of the grantees named in the act. *Ibid.* See 1 Thomp. Corp. § 647, *et seq.*

⁵ Here the Fla. Act of Dec. 11, 1866, granting to the Pensacola Telegraph Company the exclusive right of establishing and maintaining lines of telegraph, etc.

⁶ Rev. Stat. U. S., § 5263, *et seq.*

⁷ Pensacola Tel. Co. v. Western Union Tel. Co., 96 U. S. 1; affirming, s. c., 2 Woods (U. S.), 643.

one State shall not, after accepting them, be excluded by another State from prosecuting its business within her jurisdiction, is a legitimate regulation of commercial intercourse among the States, and is appropriate legislation to execute the powers of Congress over the postal service.¹

§ 10. **Exclusive Privileges under United States Patents.**—A decision of the Supreme Court of the United States, rendered in the year 1858, in regard to the rights of rival telegraph companies operating under the same patent, must have had little more than a transient interest, as that particular patent has long since expired; yet for the sake of completeness, a note of it is here given: A telegraph company secured the right to transmit telegrams, under Morse's patent, from Baltimore to Wheeling, with branches to Washington and Pittsburg. Another company had such right, under the same patent, from Pittsburg to Philadelphia, and still another had such right from Harrisburg to Baltimore. It was held that the transmission of telegrams, by the last mentioned lines, from Pittsburg to Baltimore, was no injury to the first mentioned line for which there was a legal remedy.²

§ 11. **Right to Extend Line upon Interstate Bridge over Navigable Waters.**—We have elsewhere set out, as it now stands in the Revised Statutes of the United States, the language of the Act of Congress which gives authority to telegraph lines which accept the provisions of the act to construct their lines upon certain conditions across the navigable

¹ *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1.

² *Western Tel. Co. v. Magnetic Tel. Co.*, 21 How. (U. S.) 456; *Western Tel. Co. v. Penniman*, *Id.* 460.

waters of the United States.' It has been held that the failure of such a company to file with the Postmaster-General the written acceptance of the Act of Congress, as therein provided, is fatal to a proceeding instituted by it to condemn so much of a bridge spanning an interstate navigable river as is necessary to support its proposed line.¹

§ 12. **Not Allowed to Interfere with the Opening of the Draw-Span.**—But even though the company may have acquired a right to cross a navigable stream, by accepting the provisions of the Act of Congress elsewhere set out,² it is a reasonable conclusion that its rights must be exercised in subordination to the rights of navigation. Hence, it will not be allowed so to extend its wires as to obstruct the passage of boats and vessels. Laying out of view every other consideration, it would be an obvious perversion of the meaning of the Act of Congress, to allow a telegraph company to obstruct with its wires the passage of vessels along a navigable stream, when it could easily accomplish the desired purposes by laying a *sub-aqueous* cable. This is well illustrated by a case where a telegraph company had applied in a State court for the appointment of commissioners to assess damages for the condemnation of a right of way for a telegraph company across a bridge which spanned a navigable river. It appeared from the application that the plans which the telegraph company had made for the construction and operation of its line were impracticable, and would interfere with the opening of

¹ *Ante*, § 2.

² *Chicago, etc. Bridge Co. v. Pac. Mut. Tel. Co.*, 36 Kan. 113; s. c., 12 Pac. Rep. 535.

³ *Ante*, § 2.

the draw-span of the bridge, and with the navigation of the river. The court held that the proprietors of the bridge were entitled to an injunction, restraining the telegraph company and the commissioners appointed on its application from proceeding further thereon; and that a proposal by the company, in its answer in the injunction proceeding, of a plan substantially different from the one upon which the commissioners were appointed, and which, it was claimed, would not interfere with the operation of the draw-span, would not defeat the right to the injunction.¹

§ 13. **Statutory Protection of Poles and Wires.**—Telegraph and telephone companies have frequently erected their poles and strung their wires along highways, without condemning the right of way and paying compensation for the easement to the owner of the fee, which we shall see, under the views of some courts, they are bound to do.² They have done more: they have invaded private grounds and attached their wires to chimneys and to other portions of houses without the consent of the owners. In some cases they have obtained such consent upon representations that the license would be attended with no danger or inconvenience to the property-owner, which representations have turned out to be untrue. It is well known that the danger of fire and lightning is sensibly increased by such wires being allowed to come in contact with buildings. After receiving such licenses upon such representations, they have, of course, refused to submit to the

¹ Pac. Mut. Tel. Co. v. Chicago, etc. Bridge Co., 36 Kan. 118; s. c., 12 Pac. Rep. 660.

revocation of them, but have claimed a perpetual grant, and have sometimes sought refuge under the doctrine of prescription, as applied to nuisances. To remedy such outrages many legislatures have recently enacted that no lapse of time shall justify a *prescriptive right* to any wire, pole, or cable used for any telegraph, telephone, electric light, or other electric purpose, or for the purpose of communication, attached to, extended upon or over any building or land.¹

On the other hand, land-owners and others, have cut telegraph poles and wires in places where they were rightfully planted and suspended, and to remedy such wrongs statutes have been enacted punishing the malicious injury to, or interference with the property of such corporations by fine and imprisonment.² A statute enacted by the territory (now State) of Idaho, provides:

“Any person who shall wilfully cut down or burn, or otherwise materially injure, any telegraph, telephone or electric light pole, or shall shoot so as to materially injure any insulator, or knock said insulator loose from the pole to which it is attached, or otherwise materially injure such insulator, or who shall shoot any telegraph, telephone, or electric light wire, thereby breaking said wire, or who shall otherwise wilfully cut, break, or injure such wire, shall, upon conviction thereof, be fined,” and in case of failure to pay such fine, shall be imprisoned.³

A statute of South Carolina enacts as follows:

“Any person who shall wilfully, or unlawfully, injure, damage, or destroy any pole, or wire, of any telegraph, telephone, or electric light company, in this State, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by fine, not exceeding one hundred dollars, or imprisonment, not exceed-

¹ Ill. Act June 16, 1887; L. 1887, p. 298.

² See, for instance, Nebraska Act March 30, 1887; L. 1887, ch. 87, p. 634.

³ Idaho Act of February 7, 1889; Gen. L. Idaho 1889, p. 54.

ing thirty days, or both, in the discretion of the court or a trial justice."¹

A statute of Texas is as follows:

"If any person shall intentionally break, cut or tear down, misplace, or in any other manner injure any telegraph or telephone wire, post, machinery, or other necessary appurtenance to any telegraph or telephone line, or in any way wilfully obstruct or interfere with the transmission of messages along such telegraph or telephone line, he shall be punished by confinement in the penitentiary, not less than two, nor more than five years, or by fine, not less than one hundred, nor more than two thousand dollars."²

By statute of Vermont it is provided:

"If a person wilfully, or intentionally, injures a telegraph wire, post or other fixture, erected or maintained in pursuance of this chapter, or wilfully interferes with the working of such telegraph line, or aids, or assist in such offense, he shall forfeit one hundred dollars, to be recovered by an action of debt, founded on this section, in the name of the owner of such telegraph line, for his use; and he may also be fined and imprisoned, as provided in other cases of malicious acts."³

A statute of Wisconsin is as follows:

"Any person having the right so to do, who shall remove, or change, any building, or other structure, or any timber, standing or fallen, to which any telegraph or telephone lines, or wires, are in any manner attached, or cause the same to be done, which shall destroy, disturb or injure the wires, poles, or other property of any telegraph or telephone company transacting business in this State, without first giving to such company, at its office nearest to such place of injury, at least twenty-four hours' previous notice thereof, shall be punished by imprisonment in the county jail not more than thirty days, or by fine not exceeding fifty dollars. And any person who shall break down, interrupt, or remove any telegraph or telephone line, or wire, or destroy, disturb, interfere with, or injure the wires, poles, or other property of any telegraph or telephone company in this State, shall be punished by imprisonment in the county jail, not more than three months, or by fine not exceeding one hundred dollars."⁴

¹ S. Car. Gen. Stats. 1882, § 2524.

² Rev. Stat. Tex., § 1158; Penal Code, Art. 677.

³ Rev. Laws Vt. 1880, § 3623.

⁴ Rev. Stats. Wis., § 4559, as amended by Act of April 16, 1885.

§ 14. **Damages for Cutting Such Wires.**—Such statutes are intended to give that protection to telegraph and telephone companies which could not be afforded by a civil action for damages, in view of the well known fact that the perpetrators of such mischief are often insolvent. But such an action, of course, lies; and where the author of the mischief was *another telegraph company*, a jury was found willing to assess damages in favor of a receiver of the insolvent telegraph company, whose wires had been thus cut by its solvent rival, in the sum of \$240,000, which, however, the court set aside as excessive.¹

¹ *Farnsworth v. Western Union Tel. Co.*, 6 N. Y. Supp. 735.

CHAPTER II.

RIGHT TO COMPENSATION FOR THE USE OF LAND BY TELEGRAPH AND OTHER ELECTRICAL COMPANIES.

SECTION.

17. Land may be Condemned for,
18. Whether Telegraph Lines upon Highways an Additional Servitude.
19. How as to Lines Constructed on Railroad Company's Right of Way.
20. Right of Railway Company to Compensation from Telegraph Company in such Cases.
21. Construction of a Statute as to the Power to Pass Under a Railroad.
22. Additional Burdens on the Fee by Electrical Companies.
23. Requisites of the Petition to Condemn.
24. Release of Damages by Acquiescence.

§ 17. Land may be Condemned for.—An unlimited legislative power, such as that which exists in the Parliament of Great Britain, extends to the taking of private property for public use. Our American Federal and State constitutions impose a limitation upon this power in the form of provisions to the effect that private property shall not be taken for public use without just compensation.¹ Under our American theories of government there is this implied reservation upon the power of State legislatures, that they cannot authorize the taking of

¹ Const. U. S., Amendments, Art. 5.

private property for *private* use, even on the payment of just compensation; for the power of government in free countries does not extend so far as to take one man's property from him and give it to another, or to compel one man to *sell* his property to another, when no consideration of public necessity or convenience requires it to be done. Unless the use to which such a statute undertakes to devote the property of an individual is a *public use*, the statute is, therefore, unconstitutional and void.¹ But a line of telegraph is, beyond all question, a public use, and therefore a statute authorizing the condemnation of the land of individuals to establish a line of telegraph, is constitutional and valid.² Without doubt, *telephones* stand on the same footing. They are public agencies established to facilitate the transmission of intelligence, just as telegraphs are. In fact, the telephone, so to speak, is merely a new instrument of telegraphing. On this ground, as hereafter seen,³ the power of a State to regulate telephone charges and to enact statutes against unjust discrimination by telephone companies is upheld. Statutes are now frequently enacted conferring upon telephone, as well as upon telegraph companies, the power of eminent domain.⁴

§ 18. **Whether Telegraph Lines upon Highways an Additional Servitude.**—A statute of the United States, elsewhere set out,⁵ authorizes telegraph companies which accept the provisions of the act to occupy with their lines any post-roads. By the terms

¹ *Beekman v. Saratoga, etc. R. Co.*, 3 Paige (N. Y.), 45: s. c., 22 Am. Dec. 678.

² *State v. American, etc. News Co.*, 43 N. J. Law, 381.

³ *Post*, § 104, *et seq.*

⁴ See, for instance, Laws Wash. Tr. Act. Feb. 1, 1888; ch., 33, p. 65.

⁵ *Ante*, § 2.

of another Federal statute all highways over which the mail is carried under a contract made by the Postmaster-General, and all letter carrier routes in towns and cities, are declared to be post-roads. All public streets and highways in the country, urban or rural, are thus made, roughly speaking, post-roads, and subject to be occupied by telegraph lines. But the Constitution of the United States¹ provides that private property shall not be taken for public use without just compensation. If, therefore, the occupying of a public street or road by a telegraph line is a *taking* of property within the meaning of this provision, beyond question Congress has no power to authorize it to be done, except on the terms of paying just compensation to the owner of the fee.² It may be assumed that similar provisions exist in the constitutions of all the States; and under them the question has arisen, both in regard to telegraph and telephone lines, whether the occupancy of a public street or highways by such lines is an additional servitude upon the original easement, such as requires the payment of compensation to the owner of the fee. It is a principle in the law of eminent domain that every additional burden imposed on the original easement granted by the land-owner must be the subject of a new assessment of damages, or else it gives a ground for an action for damages.³ Whether the erection of a telegraph or telephone line upon a public street imposes such an additional

¹ Amendments, Art. 5.

² That this act of Congress would be unconstitutional if it extended to authorize the taking of private property for a line of telegraph without just compensation was held in *Atlantic, etc. Tel. Co. v. Chicago, etc. R. R. Co.*, 6 Biss. (U. S.) 158.

³ *Hatch v. Railroad Co.*, 18 Ohio St. 92; *Little Miami, etc. R. R. Co. v. Dayton*, 23 Ohio St. 510; *State v. Maine*, 27 Conn. 641.

burden is a question upon which judicial opinion is very much divided. In Massachusetts and Missouri the question has been answered in the negative, but not by unanimous benches.¹ In New York, Illinois and Virginia, the opposing view is taken.² The theory of these courts is that the use of the soil of a street or highway for supporting a line of telegraph is not what may be termed a *street use*; that the public have acquired, by the condemnation or dedication of it to the uses of a street, merely the right of passage over it, the absolute property remaining in the owner of the soil from whom the right of passage was acquired; and that the erection of poles, and the stringing of wires, by a telegraph company, along such highway, is an additional servitude, and constitutes a taking of private property for public use. The Virginia Court of Appeals have held that a statute of that State³ authorizing any telegraph company to construct a line along county roads, provided the ordinary use of the road is not obstructed, does not give any right to build such line without compensation to the owner of the fee; and that if the act is intended to give such right, it is in violation of the constitutional provision against taking private property without just compensation.⁴

¹ *Pierce v. Drew*, 136 Mass. 75; s. c., 49 Am. Rep. 7 (W. Allen and C. Allen, J.J., dissenting); *Julia Building Association v. Bell Telephone Co.*, 88 Mo. 268 (Henry, C. J., and Sherwood, J., dissenting).

² *Metropolitan Telephone & Telegraph Co. v. Colwell Lead Co.*, 67 How. Pr. (N. Y.) 365; s. c., 50 N. Y. Super. Ct. 488; *Board of Trade Tel. Co. v. Barnett*, 107 Ill. 507; s. c., 47 Am. Rep. 453; *Western Union Tel. Co. v. Williams* 86 Va. 696; s. c., 8 L. R. A. 429; 14 Va. L. J. 263; 42 Alb. L. J. 4; 2 Advocate, 274; 11 S. E. Rep. 106: *post*, Ch. III.

³ Act Va. Feb. 10, 1880; Va. Code, §§ 1287-1290.

⁴ *Western Union Tel. Co. v. Williams*, *supra*.

§ 19. **How as to Lines Constructed on Railroad Company's Right of Way.**—On similar grounds it has been held that the construction of a telegraph and telephone line on a railroad company's right of way imposes an additional servitude or burden on the land, for which the *owner of the fee* is entitled to compensation, unless it is constructed by the railroad company in good faith for its own use and benefit in the operation of its road and to facilitate its business, or is reasonably necessary for that purpose.¹ But it has been held with obvious propriety that the erection of a line of telegraph by a railroad company on *its own right of way* is not an additional burden; since, such a line being indispensable to the operation of a railway, the building of it must be regarded as a part of the original easement; and to this end it is said that the railroad company "may cut down every tree and bush on the right of way, if necessary for the most constant and efficient use of a telegraph line built by it over and upon such right of way, just as it may take away a hill or fill up a ravine, for the sake of a water-tank or a station-house."²

§ 20. **Right of Railway Company to Compensation from Telegraph Company in Such Cases.**—Moreover, it has been held, on grounds already suggested,³ that neither the Acts of Congress declaring railroads to be post-roads, nor the Act of July 24, 1866,⁴ providing that telegraph companies may construct their lines over post-roads, authorized a telegraph company

¹ American Telephone, etc. Co. v. Smith, 71 Md. 535; s. c., 7 L. R. A. 200; 18 Atl. Rep. 910.

² West. Union Tel. Co. v. Rich, 19 Kan. 517; s. c., 27 Am. Rep. 159; citing St. Joseph, etc. R. Co. v. Dryden, 11 Kan. 186.

³ Ante, § 2.

⁴ *Ibid.*

to establish its lines over the right of way of a railroad company without making compensation therefor.¹ The Supreme Court of Georgia seem to have proceeded upon a similar view, holding that the erection of a line of telegraph, by a telegraph company on the right of way of a railway company, imposes an additional burden upon the easement granted to the railway company, and, the statute authorizing such an erection, having made no provision for enforcing the award of damages, was accordingly held *unconstitutional*.²

§ 21. **Construction of a Statute as to the Power to Pass under a Railroad.**—In an English case it appeared that a telegraph company had power by their act to place under any public road their wires and pipes, and to break up the pavement or soil of such road, making compensation for all damages, provided that nothing in the provision should extend or apply to any railway, except that the company might carry their wires and pipes directly, but not otherwise, across any railway, so as not to damage or be likely to damage the railway or any of the works connected therewith. A railway, pursuant to the provisions of the act incorporating the company, crossed a public road on the level. It was held that the telegraph company had no right to

¹ *Atlantic, etc. Tel. Co. v. Chicago, etc. R. Co.*, 6 Bliss. (U. S.) 158. The provision of a statute (N. Y. Laws 1853, ch. 471, § 2), authorizing telegraph companies to erect fixtures upon "any of the *public roads*," does not apply to the roadway of a *railroad* company. *New York City & Northern R. Co. v. Central Union Tel. Co.*, 21 Hun (N. Y.), 261. That real property in possession of a *bankruptcy court* cannot be acquired by proceedings to condemn it for use of a corporation, afterwards commenced in a *State court*, was held in *Western Union Tel. Co. v. Atlantic, etc. Tel. Co.*, 7 Bliss. (U. S.) 367.

² *Southwestern R. Co. v. Southwestern, etc. Tel. Co.*, 46 Ga. 43; s. c., 12 Am. Rep. 585.

place their wires and poles under that part of the public road where it was crossed by the railroad on the level, as that part was not a public road but a railway within the telegraph company's act.¹

§ 22. **Additional Burdens on the Fee by Electrical Companies.**—It has been held in New York that the legislature has no power to permit the erection of poles for *electric lighting wires* without providing for compensation to the owners of premises in front of which the poles are to be placed, the erection of such poles impairing the use of light, air, and free access.² On a similar theory, the Supreme Court of Pennsylvania has held that the laying of *under-ground gas pipes* in a country highway imposes an additional servitude for which compensation must be first made to the land-owners.³ But the use of electricity as the motive power of a *street railroad* by the device of the overhead wire, does not create a new and additional burden upon the street, entitling abutting lot-owners to compensation before such change is made, or to an injunction to prevent such change.⁴

§ 23. **Requisites of the Petition to Condemn.**—A statutory proceeding to condemn land for a public use is a special and limited proceeding contrary to the course of the common law, and is therefore subject to the well known rule applicable to such proceedings, that the facts which give the court jurisdiction to proceed must appear on the face of

¹ *Southeastern Railway Company v. European and American Electric Telegraph Company*, 9 Exch. 363; s. c., 2 C. L. R. 467; 23 L. J. Exch. 113.

² *Tiffany v. United States Illuminating Co.*, 67 How. Pr. (N. Y.) 73.

³ *Sterling's Appeal*, 111 Pa. St. 35; s. c., 56 Am. Rep. 246.

⁴ *Pelton v. East Cleveland R. Co.*, 22 Week. L. Bul. 67; *Halsey v. Rapid Transit Street R. Co.* (N. J.), 20 Atl. Rep. 859 (able opinion by Van Fleet, V. C.).

the proceedings.¹ The essential conditions named in the statute as authorizing the condemnation, must, therefore, appear on the face of the petition, unless the statute itself, or some other governing statute, prescribes otherwise. In New Jersey the petition to condemn the right of way over a *turn-pike* should state that the telegraph company is to be limited in its right to erect poles to a space of specified width along the exterior lines of the pike, and the order should be equally definite.² It has been held in the same State that proceedings under the statute for the appointment of commissioners to appraise the damages to be sustained by a land-owner from the erection and maintenance of telegraph poles, wires, etc., in front of his premises, should be set aside, if neither the petition nor the notice indicates the location and height of the poles, the number and size of the cross arms, or the number of wires they will sustain.³ If the proceeding is to assess the damages done to private property by the erection of *telephone* poles upon it, under the New Jersey statute,⁴ the petition, in order to give jurisdiction, must show that the company was organized under a law of the State; that the common council designated the streets in which the poles were to be placed; and must give a proper description of the poles and the premises. Nor are these substantial defects cured by the neglect of the land-owner to point them out on the appointment of the commissioners, nor by his consent to the appointment of commissioners.⁵

¹ Galpin v. Page, 18 Wall. (U. S.) 350, 371.

² State v. American, etc. News Co., 43 N. J. L. 381.

³ New York, etc., Tel. Co. v. Broome, 50 N. J. L. 432; s. c., 14 Atl. Rep. 122; 12 Cent. Rep. 587.

⁴ N. J. Rev., p. 1174; N. J. Rev. Supp. p. 1022.

⁵ Winter v. N. Y. etc. Tel. Co., 51 N. J. L. 83; s. c., 16 Atl. Rep. 188.

§ 24. **Release of Damages by Acquiescence.**—The Supreme Court of Michigan holds that the fact that telegraph and telephone poles and wires prevented the extinguishment of a fire does not make the company owning them liable for the loss, where the owner of the building burned, on whose land they stood, had built by the side of them, and had permitted a tenant to use one of the wires, and had never objected to them in any way before the fire. The court, distinguishing a number of cases,¹ place their conclusion on the ground of consent and adoption by the plaintiff of the offending wires, in the following language in its opinion by Mr. Justice Morse: "These cases do not meet the question presented here. Failure to protest against a nuisance for a long space of time will not prevent an action to abate it, upon the principle that each day of its continuance is a new nuisance; and many courts hold that the right to maintain a nuisance can never be gained by prescription. But I can find no authority anywhere, and I should doubt its being good law if I did find it, that will permit a man to build by the side of these telegraph and telephone poles and wires, without any protest or demur whatsoever against their standing there, when they are on his own land, and go on for years, without finding any fault whatever, and allow a tenant to use one of the wires for business purposes in his building, and then, when a fire arises, and the poles are found to hinder the firemen in their work of extinguishing it, charge up to the corporation maintaining these poles the loss occasioned by such fire. To

¹ *Reid v. Atlanta*, 73 Ga. 523; *Gray v. Boston Gas-Light Co.*, 114 Mass. 149; *Philadelphia, etc. R. Co. v. State*, 20 Md. 157; *Pettis v. Johnson*, 56 Ind. 139.

do this would be to violate one of the plainest principles of justice; and the law, in my opinion, will not permit it.”¹ The conclusion of the court, doubtful at best, is weakened by the following dissent of Mr. Justice Campbell (since deceased), an old and eminent judge: “Whatever may be its effect as a circumstance on the question of damages, I think there can be no doubt of the right of any land-owner to sue for some damages for any encroachment on his property rights. Delay in complaining may sometimes cut off a right to sue in equity, but nothing short of statutory limitations can bar a suit at law; and where a wrongful entry or intrusion is made without license or permission, no license can be legally determined from inaction.”

¹ *Chaffee v. Telephone, etc. Co.*, 77 Mich. 625; s. c., 6 L. R. A. 455; 43 N. W. Rep. 1064.

CHAPTER III.

USE OF STREETS AND HIGHWAYS BY THESE COMPANIES.

Article I. JUDICIAL DECISIONS.

Article II. STATUTES.

ARTICLE I.—JUDICIAL DECISIONS.

SECTION.

26. Power of Municipal Corporation to Grant Use of Streets to Electric Railways.
27. Injunctions Against such Use by Abutting Property-Owners.
28. When Telegraph Poles in Streets a Public Nuisance.
29. Liability of Municipal Corporation for Allowing Telegraph Poles to be Erected in its Streets.
30. Power of City to Designate the Streets to be Occupied.
31. Power of City to Remove.
32. Constitutionality of Statutes Requiring Wires to be put Under Ground.
33. Right of Telephone Companies to Erect Poles in the Streets of Cities.
34. Rights of Abutting Property-Owners.
35. Invading Private Property—Cutting Trees.
36. Revocation of License by Municipal Corporation.
37. Struggles by These Companies for the Exclusive Use of the Streets.
38. Continued: Plaintiff, an Electric Light Company, Organized by a Gas Light Company.
39. Question as Depending upon Priority of Occupancy.
40. Charter Power of Control Does not Extend to the Granting of Exclusive Privileges.
41. Who may Question Electric Light Privilege Granted by Municipal Corporation.
42. Charter Power to Authorize the use of Electricity as a Motive Power for Street Railways.

43. Injunction by Telephone Company Against Electric Railway Company.
44. Continued: Where Both Companies use the Earth for a Return Circuit.
45. Further Observations on this Subject.
46. Tax for the Privilege of Using City Streets.
47. Reasonableness of License Fee for Use of Streets.
48. Municipal Control as to the Mode of Suspending or Laying Telegraph Wires.
49. Futility of Attempts at Statutory Regulation.
50. Dangers to be Provided Against by Such Regulations.
51. New York Board of Electrical Control.
52. Mandamus to Compel City to Designate Places for Erecting Electric Light Poles.
53. Power of a Municipal Corporation to Own an Electric Light Plant.

§ 26. **Power of Municipal Corporation to Grant Use of Streets to Electric Railways.** — Municipal corporations which possess, under their charters, general control over their streets, have the power to authorize their use by street railway companies whose cars are propelled by an overhead wire or trolley. This is merely putting the streets to a new and improved use, and is not an additional servitude such as entitles the owner of the fee to compensation.¹ Nor does the mere fact that the poles to which the wires are attached are set along the borders of the sidewalk at the edge of the street, entitle him to an injunction, though whether this would be the rule if they were set in the sidewalk has been thought more doubtful, since the sidewalk is regarded as an appendage to the adjacent land.² But it is believed that whether the poles are placed in the sidewalk or not is immaterial, so far as the rights of the abutting owner are concerned.³

¹ *Ante*, § 22.

² *Halsey v. Rapid Transit Street R. Co.* (N. J.), 20 Atl. Rep. 859.

³ In the Missouri telephone cases hereafter cited (*post*, § 34), the poles were in fact placed in the sidewalk, and in one of the cases in a very narrow sidewalk, and yet it was held that the abutting owner had no right to an injunction.

§ 27. **Injunctions Against Such Use by Abutting Property-Owners.**—The Supreme Court of Michigan, on an application for an injunction by a property-owner, refused to consider the question whether the State had conferred the power upon the city to authorize the use of its streets by electric railway companies, deeming it a question resting exclusively between the State and the municipal corporation; and the court, on grounds equally unsatisfactory, refused to consider whether such a use of the streets was an additional servitude such as entitled the abutting property-owner to compensation; but refused an injunction on the ground that the effect of granting it would work an injury upon the railway company much greater than the injury which the plaintiff would suffer from the laying and operating of their railway, and that he had an adequate remedy at law.¹ But the reasoning of Vice-Chancellor Van Flack, in the case cited in the preceding section, concedes that if the use of the street is an additional servitude, the abutting owner is entitled to an injunction until compensation is paid or secured, and that his remedy at law is *not* adequate in a sense which operates to refuse him an injunction. The circumstances in which the Michigan Court refused injunctions were these: In one case the plaintiff owned a vacant piece of ground lying along a street and extending across the square so as to front upon the cross-streets. It was chiefly valuable for residence purposes, and he intended to build a residence thereon. Without objection from him, the defendant company constructed and operated

¹ *Potter v. Saginaw Union Street R. Co.* (Mich.), 47 N. W. Rep. 217. See also *Barber v. Saginaw Union Street R. Co.*, *Id.* 219.

an electric railway, with an overhead wire, along one of the cross-streets, and was about to put into operation a similar road upon the side street, upon a track long used for horse cars, fastening its cross-wires to electric light poles already erected, so that no new poles or tracks could be placed in front of the premises. The defendant had expended about \$70,000 in constructing its system of electric railways in the city. There was evidence that there would be some danger to men and animals from the electric current, and from the more rapid running of the cars, and that the current would interfere with telephone wires in the same street. The court took the view that no present injury was shown that the apprehended injury was too remote, and that, under all the circumstances, the plaintiff was not entitled to an injunction against the operation of the road.¹ In the other case it appeared that the complainant owned premises on the corner of two streets; that, at the corner diagonally opposite said premises, the railroad turned from one street into another, but that, assuming the complainant's premises to extend to the middle of the streets, the railroad nowhere came within ten feet thereof. The trolley wire curved with the track, and was over the center of it. When the suit commenced, a sustaining wire extended from the trolley wire at the

¹ *Potter v. Saginaw Union St. R. Co.* (Mich.), 47 N. W. Rep 217. The court, speaking through CHAMPLIN, C. J., said: "It is not every case of injury to real estate of a permanent character that equity will enjoin, and the court will look to all the facts and circumstances, and grant or withhold relief as the justice or equity of the case may require." *Citling Hall v. Rood*, 40 Mich. 46; *Buchanan v. Log Running Co.*, 48 Mich. 364; s. c., 12 N. W. Rep. 490; *City of Big Rapids v. Comstock*, 65 Mich. 78; s. c., 31 N. W. Rep. 811; *Blake v. Cornwell*, 65 Mich. 467; s. c., 32 N. W. Rep. 803; *Miller v. Cornwell*, 71 Mich. 270; s. c., 38 N. W. Rep. 912.

curve, and was attached to a pole standing between the sidewalk and the paved street in front of complainant's lot. This pole was stayed with a wire running into a guy-post set in the ground in front of the lot. Thereafter the defendant removed the wires and poles. The court held that a decree perpetually enjoining the defendant from erecting, within the street limits, on and in front of the complainant's premises any poles, posts, or wires, for operating its cars by electricity, without complainant's consent, gave the complainant all the relief she was entitled to.¹

§ 28. **When Telegraph Poles in Streets a Public Nuisance.**—In cases where the erection of telegraph poles in the public streets is not authorized by the legislature, if they are permanently erected and maintained in the public streets, at such places and of such size, dimensions and solidity as to obstruct and prevent the passage of carriages and horses, or foot passengers, the company will be liable in an indictment for a public nuisance.² This view can, of course, have no application where the company places its poles in the streets under the authority of an act of the legislature,³ though the rule may be differ-

¹ *Barber v. Saginaw Union St. R. Co.* (Mich.), 47 N. W. Rep. 219.

² *Reg. v. United Kingdom Electric Telegraph Company*, 31 L. J. M. C. 166; s. c., 10 W. R. 538; 6 L. T. (N. S.) 378; 2 B. & S. 647, n.; 9 Cox, C. C. 174. It was further held in this case that even if the poles were not placed upon the hard or metalled part of the highway, or upon a footpath artificially formed upon it, or although sufficient space was left for the public traffic, the company was still liable to a conviction. *Ibid.*

³ It may be stated, as a general rule, that a statute conferring power so to use the public streets legalizes what might otherwise be a nuisance, but only to the extent to which the powers are conferred. *British Cast Plate Manufacturers v. Meredith*, 4 T. R. 794; *Sutton v. Clark*, 6 Taunt. 29; s. c., 2 Thomp. Neg. 807; *Rex v. Pease*, 4 Barn. & Adolph. 30; *Vaughan v. Taff Vale R. Co.*, 5 Hurl. & N. 679; *Whitehouse v. Fellows*, 10 C. B. (N. S.) 675; s. c., 30 L. J. (C. P.) 306; *Cracknell v. Thedford*,

ent where a municipal corporation assumes to grant such a privilege. But although the company may have proceeded without the authorization of the legislature, it would not necessarily follow that an *injunction* would be granted even at the suit of the public; since, as just seen, the right can be deter-

L. R. 4 C. P. 629; Boulton v. Crowther, 4 Dowl. & Ry. 195; s. c., 2 Barn. & Cress. 703; Northern Transportation Co. v. Chicago, 99 U. S. 635; s. c., 11 Chl. L. News, 255; 2 Thomp. Neg. 692; Smith v. Washington, 20 How. (U. S.) 135; Green v. Reading, 9 Watts (Pa.), 384; O'Connor v. Pittsburgh, 18 Pa. St. 187; Callender v. Marsh, 1 Pick. (Mass.) 417; Chicago v. Rumsey, 87 Ill. 348; s. c., 10 Chl. L. News, 333; Pumpelly v. Green Bay Co., 13 Wall. (U. S.) 180; Eaton v. Boston, etc. R. Co., 51 N. H. 504. The English doctrine broadly is that an authorization of Parliament not only makes the thing lawful and hence not a *public* nuisance, but that it also prevents any right of action for damages which otherwise might exist. Those cases, of course, contain no suggestion of any constitutional restraint upon Parliament, the theory of the English law being that Parliament is supreme. The American cases, on the contrary, hold that an act of the legislature has the effect of preventing any right of action for damages, in the absence of constitutional restraints. Thus, where the act authorizes a public improvement which does not amount to a *taking* of private property for a public use, land-owners who are thereby incidentally injured have no right of action for the injury, but it is *damnum absque injuria*. But if the constitution of the State provides that private property shall not be taken or damaged for public use without just compensation, then a more difficult question arises, and the rule which makes the statute release the right of action is restrained to cases where the improvement authorized amounts neither to a taking nor to a damaging of the property of the land-owner. This is too large a subject to be gone into in a special work of this kind. Under the English law the land-owner who is damaged has compensation if provided for in the statute which authorizes the work; if not, he has nothing. Hammersmith R. Co. v. Brand, L. R. 4 H. L. 171; Buccleugh v. Metropolitan Board of Works, L. R. 5 H. L. 418. The English theory is that statutes giving damages in general terms to persons injured by public works which the statute authorizes, mean to give damages only in cases where they could have been recovered at common law, unless the statute in express terms gives other damages. In other words, the statute merely changes the remedy, or, as it is expressed in a recent English work, "merely exchanges the statutory right to compensation in respect of the legalized nuisance for the common-law right which, but for the statute, would have existed for damages for an unauthorized nuisance." Bower & Webb on Electric Lighting, 227. The learned authors cite in illustration of this principle, Ricket v. Metropolitan R. Co., L. R. 2 H. L. 175; Rothes v. Kincaldy, L. R. 7 App. 794.

mined in a legal forum, and by a jury trial. This may be illustrated by a case where a telegraph company, without any parliamentary powers, laid down their wires in tubes under a public highway. An information and bill in equity were filed by the Attorney-General, complaining of those acts as a nuisance to the public and as an invasion of the rights of the owner of the adjacent land in the soil of the road. The court refused to grant an injunction until the legal right had been established.¹

§ 29. **Liability of Municipal Corporation for Allowing Telegraph Poles to be Erected in its Streets.**

—In this country the policy has generally prevailed of authorizing this use of the streets and highways by telegraph companies; and it has been held that, where such poles are erected in the highway by the consent of the municipal board having control of the highway, *e. g.*, of the selectmen acting under the authority of a statute, the municipality is not liable.² But where the poles were erected by a *foreign corporation*, an indictment against the city was sustained, as the statute gave the right to erect such poles in the street, under the direction or authority of the highway commissioner and aldermen or selectmen of the city or town, only to companies incorporated under the laws of the commonwealth.³ The prevailing American doctrine is that a municipal corporation holds its streets as a public trust, to be maintained for the free and safe use of the public; and consequently, where the city, either by affirmative action or by positive neglect, so misconducts

¹ Att.-Gen. v. United Kingdom Electric Telegraph Company, 30 Beav. 287; 8 Jur. (N. S.) 583; 31 L. J. Ch. 329; 10 W. R. 167.

² Young v. Yarmouth, 9 Gray (Mass.), 386.

³ Com. v. Boston, 97 Mass. 558.

itself in the discharge of this trust that a nuisance dangerous to travel exists in its streets, in consequence of which a traveler, without negligence or other fault on his part, is injured, the city must pay damages to him.¹ Exceptions to this rule exist in

¹ That a municipal corporation is not privileged to maintain a nuisance, and that an action for damages may be maintained against it for an injury arising from a nuisance where, under like circumstances, such action could be maintained against an individual, is shown by the following, among many other cases: *Harper v. Milwaukee*, 30 Wis. 365, 372; *Brower v. New York*, 3 Barb. (N. Y.) 254; *Lawrence v. Fairhaven*, 5 Gray (Mass.), 110; *O'Brien v. St. Paul*, 18 Minn. 176; *Kobs v. Minneapolis*, 22 Minn. 159; *Bradt v. Albany*, 5 Hun (N. Y.), 591; *People v. Albany*, 11 Wend. (N. Y.) 543; *Philadelphia v. Collins*, 48 Pa. St. 106; *Brownlow v. Metropolitan Board*, 16 C. B. (N. S.) 546, (affirming s. c., 13 C. B. (N. S.), etc. 768). That a municipal corporation cannot permit a private person or corporation so to use property of the municipal corporation as to create a nuisance injurious to a third person without answering to him in damages, is shown by the following, among many other cases: *Lawrence v. Fairhaven*, 5 Gray (Mass.), 110; *Aurora v. Reed*, 57 Ill. 29; *Damour v. Lyons*, 44 Iowa, 276; *Van Pelt v. Davenport*, 42 Iowa, 308, 311; *Stack v. East St. Louis*, 85 Ill. 377; s. c., 5 Cent. L. J. 385; *Tallehassee v. Fortune*, 3 Fla. 19; *Wendel v. Troy*, 4 Keyes (N. Y.), 261; *Baltimore v. Marriott*, 9 Md. 160. *Contra*, *Stackhouse v. Lafayette*, 26 Ind. 17. Compare *Weeks v. Milwaukee*, 10 Wis. 242; *Smalth v. Milwaukee*, 18 Wis. 63. Among the cases, almost without number, asserting the rule that municipal corporations are liable to individuals for injuries sustained by the latter without fault on their part, through nuisances or defects in streets, alleys, sidewalks, bridges, etc., are the following: *Weet v. Brockport*, 16 N. Y. 161, note; *Hines v. Lockport*, 50 N. Y. 236 (affirming 5 Lans. (N. Y.) 16); s. c., 41 How. Pr. (N. Y.) 435; *Requa v. Rochester*, 45 N. Y. 129; *Wilson v. Watertown*, 5 N. Y. S. C. (T. & C.) 579; s. c., 3 Hun (N. Y.), 508; *Peach v. Utica*, 10 Hun (N. Y.), 477; *Conrad v. Ithaca*, 16 N. Y. 158; *Mosey v. Troy*, 61 Barb. (N. Y.) 580; *Reinhard v. New York*, 2 Daly (N. Y.), 243; *Wallace v. New York*, 2 Hilt. (N. Y.) 440; s. c., 18 How. Pr. (N. Y.) 169; *Davenport v. Ruckman*, 37 N. Y. 568; *Clemence v. Auburn*, 66 N. Y. 334; *Nims v. Troy*, 59 N. Y. 500; *Ring v. Cohoes County*, 13 Hun (N. Y.), 76; *Weightman v. Washington*, 1 Black (U. S.), 39; *Chicago v. Robbins*, 2 Black (U. S.), 418; *Nebraska City v. Campbell*, 2 Black (U. S.), 591; *Hutson v. New York*, 9 N. Y. 163; s. c., *Seld. Notes*, 208; 5 Sandf. S. C. (N. Y.) 287; *Omaha v. Olmstead*, 5 Neb. 446; *Topeka v. Tuttle*, 5 Kan. 311; *Atchison v. King*, 9 Kan. 550; *Ottawa v. Washabaugh*, 11 Kan. 124; *Wyandotte v. White*, 13 Kan. 191; *Smith v. Leavenworth*, 15 Kan. 81; *Baltimore v. Marriott*, 9 Md. 160; *Baltimore v. Pendleton*, 15 Md. 12; *Bell v. West Point*, 51 Miss.

particular jurisdictions, which there is no space here to note. Nearly all the American municipal corporations have power under their charters to abate nuisances; and while there is a principle that such corporations are not liable for damages flowing from a mere non-exercise of governmental powers,¹

262, per Peyton, C. J.; *Griffin v. Williamson*, 6 W. Va. 312; *Erie v. Schwingle*, 22 Pa. St. 388; *Kensington v. Wood*, 10 Pa. St. 93; *McLaughlin v. Corry*, 77 Pa. St. 109. In Pennsylvania, the rule extends to townships, boroughs, and counties also. *Dean v. Milford*, 5 Watts & S. (Pa.) 545; *Pittsburg v. Grier*, 22 Pa. St. 54; *Allentown v. Kramer*, 73 Pa. St. 406; *Humphries v. Armstrong County*, 56 Pa. St. 204; *Hey v. Philadelphia*, 81 Pa. St. 44. See also in support of the rule, *Shoolbred v. Charleston*, 2 Bay (S. C.), 63; *Browning v. Springfield*, 17 Ill. 143; *Alton v. Hope*, 68 Ill. 167; *Joliet v. Verley*, 35 Ill. 59; *Springfield v. Le Claire*, 49 Ill. 476; *Chicago v. Smith*, 48 Ill. 107; *Centralia v. Scott*, 59 Ill. 129; *Mechanicsburg v. Meredith*, 54 Ill. 84; *Peru v. French*, 55 Ill. 317; *Sterling v. Thomas*, 60 Ill. 264; *Cleveland v. St. Paul*, 18 Minn. 279; *Lindholm v. St. Paul*, 19 Minn. 245; *Moore v. Minneapolis*, 19 Minn. 300; *Shartle v. Minneapolis*, 17 Minn. 308; *Rusch v. Davenport*, 6 Iowa, 443; *Collins v. Council Bluffs*, 32 Iowa, 324; *Rowell v. Williams*, 29 Iowa, 210; *Manderschid v. Dubuque*, 29 Iowa, 73; s. c., 25 Iowa, 108; *Lowrey v. Delhi*, 55 Ind. 250; *Bassett v. St. Joseph*, 53 Mo. 290; *Smith v. St. Joseph*, 45 Mo. 449; *Blake v. St. Louis*, 40 Mo. 569; *Bowie v. Kansas City*, 51 Mo. 454; *Jones v. New Haven*, 34 Conn. 1; *Smoot v. Wetumpka*, 24 Ala. 112; *Atlanta v. Perdue*, 53 Ga. 607; *Milledgeville v. Cooley*, 55 Ga. 17; *Montgomery v. Gilner*, 33 Ala. 116; *Dargan v. Mobile*, 31 Ala. 469; *Centerville v. Woods*, 57 Ind. 192; *Chicago v. Herz*, 87 Ill. 541; *Barnes v. District of Columbia*, 91 U. S. 540; *Chicago v. Fowler*, 60 Ill. 322; *Tallehassee v. Fortune*, 3 Fla. 19; *Nevins v. Rochester* (N. Y. Ct. App. 1879), 19 Alb. L. J. 315; *Mendota v. Fay*, 1 Bradw. (Ill.) 418; *Patterson v. Colebrook*, 29 N. H. 94; *Newbury v. Connecticut*, etc. R. Co., 25 Vt. 377; *Holmes v. Hamburg*, 47 Iowa, 348; *The State v. Strong*, 25 Me. 297; *State v. Cumberland*, 6 R. I. 496; *Lombard v. Chicago*, 4 Bias. (U. S.) 460; *Littlefield v. Norwich*, 40 Conn. 406; *Dewey v. Detroit*, 15 Mich. 307; *Nashville v. Brown*, 9 Heisk. (Tenn.) 1.

¹ *Kelley v. Milwaukee*, 18 Wis. 83; *Goodrich v. Chicago*, 20 Ill. 445; *Griffin v. New York*, 9 N. Y. 456; *Dewey v. Detroit*, 15 Mich. 307; *Henderson v. Sandefur*, 11 Bush (Ky.), 550; *McCormack v. Patchin*, 53 Mo. 33; *Macy v. Indianapolis*, 17 Ind. 267; *Detroit v. Beckman*, 34 Mich. 125; *Lansing v. Toolan*, 37 Mich. 152; *Pontiac v. Carter*, 32 Mich. 164; *Carroll v. St. Louis*, 4 Mo. App. 191; *Saxton v. St. Joseph*, 60 Mo. 153; *Wilson v. New York*, 1 Denio (N. Y.), 595; *Rochester White Lead Co. v. Rochester*, 3 N. Y. 463; s. c., 2 Thomp. Neg. 673; *Martin v. Brooklyn*, 1 Hill (N. Y.), 545; *Mills v. Brooklyn*, 32 N. Y. 489; *Donohue v.*

yet it is, according to some holdings, indictable for failing to exercise its power to abate nuisances,¹ and according to others, it is liable in damages to private persons for a like failure.² In most of the cases which will be found in the books of reports under this head, in which the city has been held liable, the nuisance has been a defect in its traveled streets, alleys, sidewalks or bridges;

New York, 3 Daly (N. Y.), 65; Child v. Boston, 4 Allen (Mass.), 41; Jones v. New Haven, 34 Conn. 1; Kavanaugh v. Brooklyn, 38 Barb. (N. Y.) 232; Stone v. Augusta, 46 Me. 127.

¹ People v. Albany, 11 Wend. (N. Y.) 539; State v. Shelbyville, 4 Sneed (Tenn.), 176. See Hill v. State, *Id.* 443. The contrary is held in some jurisdictions. State v. Burlington, 36 Vt. 521; Paris v. People, 27 Ill. 74. An indictment is the ancient and usual remedy for the failure of a municipal corporation to perform its duty of keeping its streets and highways in repair. Austin's Case, Vent. 187; Rex v. Ragley, 12 Mod. 409; Rex v. Great Broughton, 5 Burr. 2700; Rex v. Sheffield, 2 T. R. 106; Rex v. Leake, 5 Barn. & Adol. 469; s. c., 2 Nev. & M. 583; Rex v. Edmonton, 1 Moo. & R. 24; Reg. v. Brightside Bierlow, 13 Q. B. 933; s. c., 4 New Sess. Cas. 47; 14 Jur. 174; Reg. v. Midville, 4 Q. B. 240; s. c., 3 Gale & Dav. 522; Rex v. Hatfield, 4 Barn. & Ald. 75; People v. Cooper, 6 Hill (N. Y.), 516; Rex v. Skinner, 5 Esp. 219; Rex v. West Riding of Yorkshire, 2 H. Black. 685; s. c., 5 Burr. 2595; 2 East, 342; 2 Inst. 201, 700; Com. Dig. tit. "Chlmin," B, 1; Rex v. Nottingham, 2 Lev. 112; State v. Barksdale, 5 Humph. (Tenn.) 154; State v. Murfreesboro, 11 Humph. (Tenn.) 217; State v. Loudon, 3 Head (Tenn.), 263; Davis v. Bangor, 42 Me. 522; State v. Gorham, 37 Me. 451; Commonwealth v. Springfield, 7 Mass. 9; Commonwealth v. Petersham, 4 Pick. (Mass.) 119; State v. Whittingham, 7 Vt. 391; State v. Fletcher, 13 Vt. 124; State v. Alburgh, 23 Vt. 262; State v. Fryeburg, 15 Me. 405; State v. Strong, 25 Me. 297; State v. Milo, 32 Me. 57; State v. Dover, 10 N. H. 394; State v. Gilmanton, 14 N. H. 467; State v. Canterbury, 28 N. H. 195; State v. Northumberland, 44 N. H. 628; State v. Cumberland, 6 R. I. 496; State v. Cumberland, 7 R. I. 75. In Maine and New Hampshire, towns are likewise amenable to a proceeding by *information* for not opening and repairing highways. State v. Kittery, 5 Me. 254; State v. Raymond, 27 N. H. 388; State v. Concord, 20 N. H. 295. A statute of Maine gave an indictment to recover a forfeiture of not exceeding \$1,000, where a person was killed by a defect in the highway. State v. Bangor, 30 Me. 341.

² In such cases the words "power" and "authority" in the charter of a city in respect of the abatement of nuisances, may well be held to mean *duty* and *obligation*. Baltimore, etc. R. Co. v. Marriott, 9 Md. 160; Campbell v. Montgomery, 53 Ala. 527.

but the doctrine has been held equally applicable in the case of a nuisance in the street of a city resulting in injury to adjacent property—as where, by reason of a gutter getting out of order, the lots of a land-owner are flooded;¹ or where the city permits market stalls to remain in a long improved and travelled street to the detriment of adjacent proprietors.² In such a case the injured person may maintain an action either against the city or against the more direct author of the nuisance. If, in such a case, he sustains an action against the city, and the city satisfies the judgment, it may maintain an action against the author of the nuisance for reimbursement, unless the city has affirmatively authorized the nuisance: the conception being that they do not stand *in pari delicto*, the case presenting an exception to the well known rule that the law will not enforce contribution among tort-feasors.³ But where the city has authorized the nuisance, and has been adjudged to pay damages therefor, it has no

¹ *Alton v. Hope*, 68 Ill. 167.

² *St. John v. New York*, 3 Bosw. (N. Y.) 483; s. c., 6 Duer (N. Y.), 315.

³ *Lowell v. Boston, &c. R. Co.*, 23 Pick. (Mass.) 24; *Lowell v. Short*, 4 Cush. (Mass.) 275; *Milford v. Holbrook*, 9 Allen (Mass.), 17; *Boston v. Worthington*, 10 Gray (Mass.), 496; *Woburn v. Boston, etc. R. Co.*, 109 Mass. 283; *Woburn v. Henshaw*, 101 Mass. 193; *West Boylston v. Mason*, 102 Mass. 341; *Westfield v. Mayo*, 122 Mass. 100; *Centerville v. Woods*, 57 Ind. 192; *Portland v. Richardson*, 54 Me. 46; *Lowell v. Spaulding*, 4 Cush. (Mass.) 277; *Littleton v. Richardson*, 34 N. H. 179; *Chicago v. Robbins*, 2 Black (U. S.), 418; *Robbins v. Chicago*, 4 Wall. (U. S.) 657; *Rochester v. Montgomery*, 9 Hun (N. Y.), 394 (affirmed, 72 N. Y. 65); *Brooklyn v. Brooklyn City R. Co.*, 47 N. Y. 475; *Independence v. Jeckel*, 38 Iowa, 427; *Severin v. Eddy*, 52 Ill. 189; *Norwich v. Breed*, 30 Conn. 535. The rule is the same where, in such a case the city paid an undoubted liability of this kind without suit. *Swansey v. Chase*, 16 Gray (Mass.), 303. Upon like grounds, a person who has unlawfully injured the public street of a town, and has refused to repair the injury after demand by the town, must pay to the town the cost of such repairs. *Centerville v. Woods*, 57 Ind. 192.

action for damages over against the party whom it has authorized to erect the nuisance; for, in such a case, it is *in pari delicto* with him. Thus, an electric light pole in a village street was adjudged to be a nuisance as to its location, in an action against the village for personal injuries occasioned thereby. The pole was erected by an electric light company under a contract with the village, which approved of its location. It was held that the village, and the successor to the electric light company, were *in pari delicto*, and that the former was not entitled to contribution from the latter, on account of the damages recovered against it.¹

§ 30. **Power of City to Designate the Streets to be Occupied.**—Such being the power usually possessed by municipal corporations over their streets, it would seem equally to follow, without the aid of any express statute, but of course in the absence of any prohibitory one, that such corporation has the power to prescribe the streets on which such poles or posts may be located, to prescribe their height, dimensions and distance apart, and the manner of extending wires thereon, in such manner as to prevent them from becoming a nuisance to public travel, but, of course, with the proviso in all cases that the regulation should not be *unreasonable*. Statutes have been enacted expressly conferring this power. Thus, by a recent statute of New Jersey, common councils, township committees, and other legislative bodies of cities, town, etc., are required to give telegraph or telephone companies a written designation of streets or highways in which posts or poles of such companies may be placed, and the man-

¹ *Geneva v. Brush Electric Co.*, 50 Hun (N. Y.), 581; s. c., 20 N. Y. St. Rep. 424; 3 N. Y. Supp. 595.

ner of placing them.¹ The next section provides that "it shall be unlawful for any telegraph or telephone company to construct, rebuild, or extend any telegraph or telephone line, or to erect any posts or poles therefor in any city, town, village, or borough, having the powers enumerated in the first section of this act, without first obtaining such designation of their route, and then only upon the street, streets, or highways so to be designated."² Under an earlier statute of the same State,³ which provided that no posts or poles should be erected in any street of any incorporated city or town without first obtaining from such municipality a designation of the street in which they should be placed, and the manner of placing them, and which made it the duty of the municipal authorities to make the designation on the application of a telegraph company—it was held that the designation by the authorities was a *prerequisite* to the erection of poles.⁴ But under this statute the authorities of an incorporated town cannot, before prescribing regulations for the elevation at which such wires shall cross the streets, treat as a nuisance such a use of the streets for that purpose as in no way endangers their full, free and safe use for the purposes of public travel.⁵

§ 31. **Power of City to Remove.**—If, as just seen, a municipal corporation is also indictable for permitting a nuisance to exist in its streets, *a fortiori*,

¹ N. J. Act of April 1, 1887, Laws 1887, ch. 87, Sec. 1.

² *Ibid.* § 2.

³ N. J. Rev., p. 1174; N. J. Pamph. Laws, 1881, p. 201.

⁴ New York, etc. Tel. Co. v. East Orange, 42 N. J. Eq. 490; s. c., 8 Atl. Rep. 289; 6 Cent. Rep. 547; 10 East Rep. 909. A permission given by the *road board* does not obviate the necessity of a formal designation by the regular authorities. *Ibid.*

⁵ American Union Tel. Co. v. Harrison, 31 N. J. Eq. 627.

it has power to remove the nuisance. That such power exists in municipal corporations, charged by their charters or by statute with the care and reparation of their streets, is well settled;¹ and hence, where the right of a private corporation to erect telegraph poles in the street of a municipality is *doubtful*, an *injunction* will not be granted to restrain the municipality from removing them.²

§ 32. **Constitutionality of Statutes Requiring Wires to be put Under Ground.**—A statute which requires corporations owning telegraph, telephone, electric, or other wires or cables, to remove them from the surface of the streets of cities having a population of 500,000 or over, and to place them under the ground, and, in the event of their not doing so, empowering the city to make such removal at their expense; which further provides that three commissioners shall be appointed to enforce the provisions of the statute by causing the removal of wires and cables; which imposes on the companies the duty of filing with such commissioners a map showing the streets or highways which the companies desire to use, and the general location, dimensions, and course of the underground conduits desired to be constructed; and which forbids the construction of such conduits, unless the plan of construction is approved by such commissioners—is not, in the view of the Court of Appeals of New York, unconstitutional. The court hold that such a statute does not impair existing franchises, but merely regulates the mode of their enjoyment, to the end that due regard may be had to the rights of

¹ 1 Dill. Munc. Corp., 4th ed., § 374.

² New York, etc. Tel. Co. v. East Orange, 42 N. J. Eq. 490; s. c., 8 Atl. Rep. 289; 6 Cent. Rep. 547; 10 East. Rep. 909.

others, and in such a way that the wires and cables shall cease to be a public nuisance, and be enjoyed in such a manner as to produce as little inconvenience and danger to the public as possible.¹ The same statute was challenged in the Circuit Court of the United States before Mr. Circuit Judge Wallace, and he held that the subject was sufficiently doubtful to warrant him in refusing an injunction until the question should be settled by the Supreme Court of the United States.²

§ 33. **Right of Telephone Companies to Erect Poles in Streets of Cities.**—This question must, of course, depend upon the state of the statute law of the State, upon the provisions of the charter of the particular city, or, if the city is organized under a general law, upon the provisions of that law, and also upon the provisions of any city ordinances that may have been passed in pursuance of authority conferred upon the legislature of the city by its charter or governing statute. Statutes have been enacted in some of the States requiring the consent of the municipal authorities; in others, the charters of municipal corporations give them power to regulate such companies. But where the State itself, by a statute, authorizes the use of the streets of towns and cities for such purposes, it is competent for the municipality to impose general conditions or restrictions upon the grant, and if such restric-

¹ *People v. Squire*, 107 N. Y. 593; s. c., 1 Am. St. Rep. 894, the court citing, as to the nature of police power: *Com. v. Alger*, 7 Cush. (Mass.) 53, 84; *Thorpe v. Rutland, etc. R. Co.*, 27 Vt. 140, 149; s. c. 62 Am. Dec. 625; *Presbyterian Church v. New York*, 5 Cow. (N. Y.) 538; *People v. Morris*, 13 Wend. (N. Y.) 325.

² *Western Union Tel. Co. v. Board of Electric Control*, 38 Fed. Rep. 552; s. c., 5 Rail. & Corp. Law J. 382. See comments on this case, 23 Am. Law Rev. 431.

tions are attempted, the proper municipal board will be compelled by mandamus to permit the erection of the poles without restriction.¹

§ 34. **Rights of Abutting Property Owners.**—Telephone poles manifestly stand on the same footing in respect of this question as telegraph poles;² and, although the act of Congress elsewhere set out³ does not apply to telephone companies, yet, if it did, it would not create any distinction in respect of the question under consideration; for, as already seen, Congress is, equally with the State legislatures, restrained from authorizing the taking of private property for public use without just compensation.⁴ In its application to the poles of telephone companies, the question has elicited a division of judicial opinion. In Missouri, telephone and telegraph companies are authorized by statute to set their poles and their fixtures along and across any of the public roads, streets and waters of the State, in such a manner as not to incommode the public in the use of such roads, streets and waters.⁵ It has been held in that State, under this statute, and under the charter of the city of St. Louis and ordinances passed in pursuance thereof, that a telephone company might lawfully erect its poles in the streets of that city at places designated by the board of public improvements, and that an abut-

¹ *State v. Flad*, 23 Mo. App. 185. The New Jersey statutes, in requiring the consent of the *town* authorities to the placing of telegraph poles in the streets, are construed to require this consent in the case of a *township* where the ways are streets and not roads. *Broome v. New York*, etc. Telephone Co., 49 N. J. L. 624.

² *Post*, § 93.

³ *Ante*, § 2.

⁴ *Ante*, § 17.

⁵ Rev. Stat. Mo. 1879, § 879.

ting lot-owner could not restrain them from so doing by an injunction.¹ These decisions proceed on the view that the imposition of such an additional servitude on the streets is not inconsistent with its original dedication, in such a sense as to make such structures a nuisance. Or, as was said by Lewis, P. J., in one of the cases just cited: "The dedication or condemnation of public streets in a city does not limit their use to the purpose of passways for persons and vehicles, but extends to every use which may advance the public comfort and convenience, within the legitimate sphere of municipal regulation. That the particular use was not in contemplation when the dedication was made is of no consequence."² The question of the right of abutting property owners to an assessment of damages for the imposition of the additional servitude upon the street was not considered. So, the Supreme Court of Louisiana have taken the view that the legislature can authorize the use of public ways by a telegraph

¹ *Gay v. Mutual Union Tel. Co.*, 12 Mo. App. 485; *Julia Building Association v. Bell Telephone Co.*, 13 Mo. App. 477; s. c., affirmed, 88 Mo. 258; 57 Am. Rep. 398, Henry, C. J., and Sherwood, J., dissenting. The same view has been taken by the Supreme Court of the District of Columbia in respect of *telegraph* companies. That court holds that the right of telegraph companies to lay lines, etc., is the same in streets of the District of Columbia as over post-roads generally, under U. S. act of July 24, 1866. Nor does the joint resolution of March 3, 1863, regulating the construction of lines in the District, limit the power. And when the District commissioners have authorized the construction of an overhead line along a business street with poles 150 feet apart, the construction will not be enjoined at the instance of a few storekeepers who consider it a nuisance. *Hewett v. Western Union Tel. Co.*, 4 Mackey (D. C.), 424; s. c., 54 Am. Rep. 284.

² *Julia Building Association v. Bell Telephone Co.*, 13 Mo. App. 477, 481. "It is perfectly consistent with the purposes for which streets are acquired, that the public authorities should adapt them, in their use, to the improvements and conveniences of the age." *Van Fleet, V. C.*, in *Halsey v. Rapid Transit Street R. Co.* (N. J.), 20 Atl. Rep. 860; citing *Railroad Co. v. Newark*, 10 N. J. Eq. 352, 359.

company for the location of its poles, notwithstanding the dissent of abutting land-owners.¹ The Supreme Court of Minnesota have affirmed the contrary doctrine in a particular case by an equally divided court.² In New Jersey the same view has been taken; and it has been held that a telephone company may be compelled by mandatory injunction to remove its poles from the highway in front of the premises of an individual, there having been neither consent on his part nor a condemnation, and the company justifying under permission from a public road board.³

§ 35. **Invading Private Property — Cutting Trees.**—But even assuming that the State, or a municipal corporation under the authority of its charter or some statute, has the power to grant a right of way over the streets of the municipality in disregard of any supposed rights of abutting property owners, yet such a grant manifestly cannot confer the right of directly invading or trespassing upon private property; nor could the destruction of private property for such a purpose be authorized by the State, under American constitutions that provide for the payment of just compensation. Accordingly, it has been held that such a grant does not confer the right to cut the limbs of trees, merely because by doing so the telephone company can the more easily construct its line, and this although the trees project over the

¹ *Irwin v. Great Southern Telephone Co.*, 37 La. An. 63 (Manning, J., dissenting).

² *Willis v. Erie Teleg. & Teleph. Co.*, 37 Minn. 347; s. c., 34 N. W. Rep. 337.

³ *Broome v. New York, &c. Tel. Co.*, 42 N. J. Eq. 141; s. c., 7 Atl. Rep. 851; 5 Cent. Rep. 814.

sidewalk.¹ So, a company which undertakes, under a contract with a municipal corporation, to lay a *fire-alarm telegraph*, has no right to invade the premises of an abutting owner and cut off limbs of trees, overhanging the sidewalk, not obstructing its use, or when the posts and wires could easily be located elsewhere. Such a company cannot, it is held, justify the cutting off of the branches of such trees, so as to leave an open space in the foliage from twenty-five to forty feet wide, for the purpose of passing a small wire through. Nor was the trespass a trifling one; for the court held that the company was liable for the value of the trees, the deprivation of the enjoyment to be derived from them, and the aggrieved feelings caused by their destruction. Stress was also laid upon the fact that the trees were not in themselves a nuisance, and had not been so declared by the statute.²

§ 36. **Revocation of License by Municipal Corporation.**—Where a municipal corporation, under a statutory power, has, by ordinance or other lawful mode, authorized a telephone company to erect its posts or poles in certain designated streets, and the company proceeds so to erect them, and to expend money on the faith of the license so granted, it thereby acquires a vested right to the use of the designated streets, so long as it conforms to the conditions of the license; and the license cannot thereafter be revoked by the municipality.³ So, an ordinance authorizing a telephone company to maintain lines on

¹ *Memphis Bell Telephone Co. v. Hunt*, 16 Lea (Tenn.), 456; s. c., 57 Am. Rep. 237.

² *Tissott v. Great Southern Telephone & Telegraph Co.*, 39 La. An. 996; s. c., 3 South. Rep. 261.

³ *State v. Jersey City*, 49 N. J. L. 303; s. c. 8 Atl. Rep. 123; 6 Cent. Rep. 538; *sub nom.* *Hudson Tel. Co. v. Jersey City*, 10 East. Rep. 119.

the streets, without limitation as to time, for a stipulated consideration, when accepted and acted on by the grantee, by a compliance with its conditions, becomes a contract, which the city cannot abolish or alter, without consent of the grantee. The city cannot, therefore, impose a new and burdensome condition, such as an annual charge or tax on the poles; nor can such a charge be upheld as a proper exercise of the police power.¹ Nor does a proviso in the ordinance containing the grant that the acts of the company under the ordinance shall be subject to any ordinance thereafter passed, convert the grant into a mere revocable permit; but it only subjects the company to future regulations, not inconsistent with the ordinance itself.²

§ 37. **Struggles by These Companies for the Exclusive Use of the Streets.**—The early history of the railroad, telegraph, gas-light, and other corporations organized to subserve public objects for private gain, presents struggles for exclusive privileges on the part of those which had the good fortune first to receive their franchises. Corporations organized to serve the public by conveying the sound of the human voice, by lighting the streets, by distributing light, heat and power to the inhabitants, and by propelling passengers along the streets by means of electricity, have formed no exception to this rule. A statute of Pennsylvania³ conferring exclusive privileges on corporations organized “for the supply of water to the public, or for the manufacturing of gas, or the supply of light or heat to the public by

¹ *New Orleans v. Great Southern Telephone & Tel. Co.*, 40 La. Ann. 41; s. c., 3 So. Rep. 533.

² *Ibid.*

³ Penn. Act of April 29, 1874, § 34, cl. 3.

any other means," has been held not to extend to electrical light companies, under the well known rule¹ that a legislative grant of exclusive privileges to a corporation is to be construed strictly. "Every intendment," say the court, "not absolutely in favor of the grant, must be construed against it. Monopolies are favorites neither with courts nor people. They operate in restraint of competition, and are hence, as a rule, detrimental to the public welfare. Nor are they at all allowable, except where the resultant advantage is in favor of the public, as, for instance, where a water or a gas company could not exist except as a monopoly.'"

§ 38. **Continued: Plaintiff an Electric Light Company Organized by a Gas-Light Company.**—Where the action was by one electric light company to enjoin another such company from furnishing electric light to the inhabitants of a city, and it appeared that the stock of the plaintiff company was, soon after its organization, purchased by the president of an existing gas company, in order that "the two companies might work in harmony, and furnish all the facilities demanded by the public for light, without that ruinous competition which might prove disastrous to both"—the court found that the plaintiff company was the mere tool of the gas-light company, and for that reason refused an injunction. Gordon, C. J., said: "Now, the primary object of the institution of a corporation is the public welfare, and the interest of the stockholders is but second-

¹ See *Emerson v. Com.*, 108 Pa. St. 111; *Com. v. Erle, etc. R. Co.*, 27 Pa. St. 351; *Packer v. Sunbury, etc. R. Co.*, 19 Pa. St. 218.

² *Scranton Electric Light and Heat Co.'s Appeal*, 122 Pa. St. 154; s. c. 13 Cent. Rep. 482; 15 Atl. Rep. 446; 22 W. N. C. 242; 1 L. R. A. 285; 21 Chic. L. News, 108.

ary ; hence the willful frustration of that intention by the act of a company is a fraud on the public, and the corporation perpetrating it is entitled to no equitable consideration. According to the finding of the master, of this kind of fraud the complainant has been clearly guilty ; it has become the mere instrument in the hands of the gas and water company to deprive, by false pretense, the city and citizens of Scranton of a very useful, if not absolutely necessary commodity. How, then, can it stand in a court of equity ? It is to no purpose to say that its charter cannot be attacked in this collateral proceeding. No one is attacking its charter ; but it cannot interpose that charter as a cover for its own fraud. It has appealed to the equitable side of the court to suppress, for its own benefit, a competition that has arisen from its neglect of a charter duty ; and, without touching upon its legal rights or legal remedies, this, we think, cannot be done. Chancery deals only with conscionable demands ; and with those that are unconscionable, whether through fraud or neglect, it will have nothing to do.”¹

§ 39. **Question as Depending Upon Priority of Occupancy.**—A corporation which is lawfully occupying the streets of a town or city with its plant will not, for obvious reasons, be compelled to give way to a new comer. This is well illustrated by a recent case in Nebraska, where the action was by a telephone company to enjoin an electric light company from erecting its poles and wires along the same street on which the telephone wires were placed. It appeared that the ordinance giving the authority to the defend-

¹Scranton Electric Light and Heat Co.'s Appeal, 122 Pa. St. 154; s. c., 13 Cent. Rep. 432; 15 Atl. Rep. 446; 22 W. N. C. 242; 1 L. R. A. 285; 21 Chic. L. News, 108.

ant to erect its poles and wires upon the street had been passed, and that the defendant company had constructed its plant, had erected a part of its poles and wires, had decided upon the streets and public grounds which it would occupy, and notified the plaintiff company of its action, before the plaintiff had constructed its lines thereon; that the officers of plaintiff had stated that such action would be satisfactory to them; that the defendant had commenced the erection of its line on the streets designated, when the plaintiff erected its poles and wires on the designated line; and that immediately thereafter the defendant had completed the erection of its electric light poles and wires. The Supreme Court held that the finding of the court that defendant had first occupied the street, in pursuance of legal authority, was sustained by the evidence, and that a decree refusing an injunction was proper, no affirmative relief having been demanded by the answer. The court reversed so much of the decree of the court below as enjoined the plaintiff, the telephone company, from placing its wires near those of the electric light company.¹

§ 40. **Charter Power of Control does not Extend to the Granting of Exclusive Privileges.**—The power vested in a municipal corporation by its charter to make, amend or repeal any ordinances deemed desirable for lighting its streets, has been held not to confer upon the city, by implication, the power to grant the *exclusive* use of the streets for wires and poles for electric lights for fifteen years.² Where a city granted to a street railway

¹ Nebraska Tel. Co. v. York Gas & Electric Light Co., 27 Neb. 284; s. c., 43 N. W. Rep. 126.

² Grand Rapids Electric Light, etc. Co. v. Grand Rapids, etc. Co., 33 Fed. Rep. 659.

company the exclusive right for thirty years to use the streets for cars to be "operated with animal power only," it was held that this did not preclude the right of the city to authorize, within the term, the operation of cars by another company, by electric or motive power other than animal power, even though the original grant stipulated that the city should not confer upon any other person or corporation any privileges which would impair or destroy the privileges granted, and though at the time of such original grant, it is probable that the only motive powers in the mind of any one were animal power and steam power.¹

§ 41. **Who may Question Electric Light Privilege Granted by Municipal Corporation.**—It has been held that the right granted by a city to erect towers or supports for electric wires and cables, and to remove obstructions to such erections, cannot be contradicted by one who does not claim an exclusive or concurrent right.²

§ 42. **Charter Power to Authorize the Use of Electricity as a Motive Power for Street Railways.**—The case of *Taggart v. Newport Street Railway*, recently decided by the Supreme Court of Rhode Island, is an interesting contribution on this new subject.³ A statute incorporating a street railway company contained a section requiring notice to abutting property-owners, by publication, before the location of the proposed tracks, and it also provided that "the tracks or road shall be operated

¹ *Teachout v. Des Moines, etc. R. Co.*, 75 Iowa, 722; s. c., 4 Rail. & Corp. L. J. 13; 36 Am. & Eng. R. Cas. 108.

² *New Orleans Gas Light Co. v. Hart*, 40 La. An. 474; s. c., 4 South. Rep. 215. See *ante*, § 27.

³ Reported 2 Adv. 272; s. c., 19 Atl. Rep. 326. See also *Williams v. City Electric Street R. Co.*, 41 Fed. Rep. 556.

and used by said corporation, with steam, horse, or other power, as the city council may from time to time direct." It was held that, after an ordinance had been passed permitting the use of horse power, it was competent for the city council to pass a second ordinance changing the power to electricity, without further notice being given to the property owners. Next, as to the interpretation of this ordinance, it was held that the power conferred on the city council to authorize the use of electricity as a motive power, carried with it the power to erect poles on the sidewalk, notwithstanding the act to incorporate the street railway company provided that "said corporation shall not encumber any portion of the street occupied by said tracks." The poles were not regarded as an encumbrance within the meaning of this prohibition, but as being necessary for the successful operation of the road. It was incidentally decided that the change of power, by which a street railway is operated, from horse to electricity, and the consequent erection of poles necessary for its operation by electricity, does not impose an additional burden or servitude upon the fee of the abutting property owners in the highway, for which they are entitled to additional compensation.⁵

§ 43. **Injunction by Telephone Company against Electric Railway Company.**—In New York a temporary injunction has been ordered at the suit of a

⁵ See *ante*, § 18. The New York statute (N. Y. Laws 1862, ch. 233), authorizing a turnpike company to operate a street railroad, and to use "the power of horses, animals, or any mechanical or other power, or any combination of them, which such company might choose to employ, except the force of steam," has been held to embrace electricity as a mode of power. *Hudson River Telephone Co. v. Watervliet Turnp., etc. Co.*, 29 N. Y. State Rep. 694.

telephone company, duly organized and having the right to occupy the streets of a city with its wires, upon a complaint alleging that the defendant is about to erect poles and string wires for the purpose of propelling its cars by electricity, on lines in close proximity to and parallel with the plaintiff's wire, and upon its being shown that powerful currents of induction and conduction will thereby be produced which will interfere with and prevent the carrying on of plaintiff's business and produce irreparable injury.¹ The court did not regard it as a good defense to such a proceeding that the railway company had acquired the lawful right to build and operate its road upon the streets; but it took the just view that such a grant cannot be made to the destruction of rights already vested, but that it is a reasonable condition implied in every such grant that the grantee will indemnify the others rightfully upon the streets against the expense to which its entry subjects them; and the court ruled that the expense which a telephone company incurs by having to change its plant in consequence of the interference of the railway company will be determined on the hearing of an application for injunction.² The court reasoned that each of such grantees should do what is reasonably necessary to avoid interference with the others and to protect itself; and it held that neither company has an exclusive privilege to use what is called the grounded or earth circuit.³

¹ Hudson River Telephone Co. v. Watervliet Turnp., etc. Co., 29 N. Y. State Rep. 22.

² *Ibid.*

³ *Ibid.* The Court of Appeals of New York refused an injunction *pendente lite* in the same case, on the ground that the right of the plaintiff telephone company to a final injunction, for which suit is pend-

§ 44. Continued: Where Both Companies Use the Earth for a Return Circuit.—These interferences are very apt to take place where both the telephone and electric railway company use the earth for their return current. In such cases it has been found that the more powerful street railway current will mingle with the telephone current and so charge the telephone wires as to render them useless. In such a case either can obviate the difficulty by changing to a different system, by which it uses a second wire for the return current; but this requires an increase of expense. In such a case the question has presented itself to the courts, which company shall go to this increased expense? In a case where the telephone company had occupied the streets of a city for ten years, using the earth for its return current, it was held that it was entitled to an injunction against a street railway company which entered upon the use of the street by what is known as the "trolley system," in which a single "trolley," or overhead wire is used, with the earth for the return current.¹ In a similar case in the United States Circuit Court, it was held by Mr. District Judge Brown that a telephone company cannot maintain a bill to enjoin the operation of a subsequently-constructed electric railway, to prevent the disturbance of plaintiff's business occasioned by the escape of electricity from defendant's rails, which

ing in the court of original jurisdiction, was doubtful, and that all of the important questions involving the substantial rights of the parties would be ultimately determined in that suit. *Hudson River Teleph. Co. v. Watervliet Turap., etc. Co.*, 31 N. Y. St. Rep. 524; s. c., 24 N. E. Rep. 832.

¹ *City & Suburban Tel. Ass'n v. Cincinnati, etc. R. Co.*, 23 Weekly Law Bul. 165. Hunt, P. J., afterwards filed an able dissenting opinion: 24 Weekly Law Bul. 489.

is an incidental result of the operation of the road, where the evidence shows that the plaintiff may obviate the disturbance by the use of a single return wire on each route disturbed by the railway service, to which each telephone is connected, and which operates to complete the metallic circuit, and that such device is simpler and less expensive than any the railway could adopt to effect the same end; while the defendant could not avoid it except by an expenditure which would double the cost of its plant—and this, although the plaintiff was prior to the defendant in the occupancy of the streets with its wires. The learned judge, finding from the evidence that the interference could probably be avoided by the use by the telephone company of a device known as the “McClure system,” at the cost of not more than \$10 to each telephone, and that it could not be avoided by the railway company except by the use of a return wire or trolley which would nearly double the cost of its plant—held that the telephone company was not entitled to an injunction by reason of its prior occupancy of the street. In concluding his opinion he said:

“If, in the case under consideration, it were shown that the double trolley would obviate the injury to complainant without exposing defendants or the public to any great inconvenience or a large expense, we think that it would be their duty to make use of it, and should have no doubt of our power to aid the complainant by an injunction; but, as the proofs show that a more effectual and less objectionable and expensive remedy is open to the complainant, we think that the obligation is upon the telephone company to adopt it, and that defendants

are not bound to indemnify it; in other words, that the damage incidentally done to the complainant is not such as is justly chargeable to the defendants. Unless we are to hold that the telephone company has a monopoly of the use of the earth, and of all the earth within the city of Nashville, for its feeble current, not only as against the defendants, but as against all forms of electrical energy which, in the progress of science and invention, may hereafter require its use, we do not see how this bill can be maintained. We place our denial of an injunction upon the grounds:

“1. That the defendants are making lawful use of the franchise conferred upon them by the State, in the manner contemplated by the statute, and that such act cannot be considered a nuisance in itself.

“2. That, in the exercise of such franchise, no negligence has been shown, and no wanton or unnecessary disregard of the rights of the complainant.

“3. That the damages occasioned to the complainant are not the direct consequence of the construction of the defendants' roads, but are incidental damages resulting from their operation, and are not recoverable.

“4. The cases involving this principle are almost innumerable; and in our examination of them we are satisfied the great weight of authority bears in the direction we have indicated. As a result, the motion for an injunction must be denied.”²

§ 45. **Further Observations on this Subject.**—It should be observed, in connection with so much of

² *Cumberland Telephone & Telegraph Co. v. United Electric R. Co.*, 42 Fed. Rep. 273.

this decision as denies the right of the prior occupant to exclude all subsequent comers whose work may in any way interfere with his works, that the converse rule of "coming to a nuisance," which denies the right of a subsequent comer to complain of a nuisance previously existing, seems to be now completely exploded in England.¹ In both of these cases the one having the prior right must yield his right and submit to damage and inconvenience to some extent for the good of his neighbor and of society. This principle is operative in many situations. It is constantly applied in actions at law for damages, so as to prevent the plaintiff from recovering damages for an injury which might have been prevented by reasonable care on his part *after* receiving the hurt from the defendant. In such a case the plaintiff is under both a moral and a legal duty to use reasonable pains, care and skill to arrest or diminish the damages which may have been inflicted upon him by the wrong of the defendant, and he can only charge the defendant for such damages as have accrued, or as would have accrued, to him notwithstanding the exercise of such pains, care and skill.² On like grounds, and in accordance with the views of Judge Brown above quoted, a court of equity, which has been aptly called "a court of conscience," will not go to the extreme of enjoining one party in the exercise of his lawful business, because of an injury to another party which the latter may ward off at very slight expense.³ Such a case does not present that "strong

¹ *Sturges v. Bridgman*, 11 Ch. Div. 853.

² *Jenks v. Wilbraham*, 11 Gray (Mass.), 143; *Bardwell v. Jamaica*, 15 Vt. 438.

³ *Rosser v. Randolph*, 7 Port. (Ala.) 238; s. c., 31 Am. Dec. 712.

- and mischievous case of present necessity," which eminent chancellors have held necessary to invoke this extraordinary aid of a court of equity.¹

§ 46. **Tax for the Privilege of Using City Streets.**

—Congress, as already seen,² has authorized any company accepting the provisions of the act to occupy with its poles and wires any *post-road*. By the Constitution of the United States, Congress has power to establish post-offices and post-roads.³ Under this provision, Congress has established as post-roads (among others) any road on which the mail is carried for the time being under a contract made by the Postmaster-General, and all letter-carrier routes established in any city or town for the collection and delivery of mail matter.⁴ This has the practical effect of making every street in every city or town, which has a system of mail-delivery by letter-carriers, a post-road. Telegraph companies accepting the provisions of the first named act of Congress, having thus acquired the right to use any street in such a city or town for the purpose of setting its poles and stringing its wires, it is plain that the city or town, acting under the State authority, cannot impose a tax upon such telegraph companies for the privilege of so doing; for no State authority can lay a tax upon a privilege granted by Congress, especially where the thing privileged is made by the act of Congress an agency of the general Government.⁵ But this exemption

¹ Attorney-General v. Nichol, 16 Vesey, 338; Van Bergen v. Van Bergen, 3 Johns. Ch. (N. Y.) 387.

² *Ante*, § 2.

³ Const. U. S. Art. I, § 8.

⁴ Rev. St. U. S. § 3964.

⁵ St. Louis v. Western Union Tel. Co., 39 Fed. Rep. 59; Philadelphia v. Western Union Tel. Co., 40 Fed. Rep. 615.

extends only to so much of the lines of such a telegraph company as extend, in the language of the act of Congress,¹ "through and over any portion of the public domain of the United States, over and along any of the military or post-roads of the United States, which have been or may hereafter be declared such by law, and over, under and across the navigable streams or waters of the United States.'" Where the amount of a tax or excise imposed by a State on a telegraph company was determined by ascertaining what proportion the number of miles of its lines in the State bore to the whole number operated by the company, and taxing an equal portion of the assessable value of the company's stock, —it was held that the principle itself not being unjust, and it not appearing that the company was injured by any principle or rule of law not equally applicable to other similar objects of taxation, the tax would not be declared void on the ground that no deduction was made for the value of property of the company subject to local taxation in other States, the company owning no such property within the State imposing the tax.²

§ 47. **Reasonableness of License Fee for Use of Streets.**—A recent decision of the Supreme Court of Pennsylvania upholding the validity of an ordinance of the city of Philadelphia levying a license tax upon telegraph companies for the privilege of setting their poles in the streets, is, under the Federal decisions just quoted, unsound in its application to that company, which, under acts of Congress,

¹ Rev. St. U. S. § 5263.

² *Western Union Tel. Co. v. Massachusetts*, 125 U. S. 530; affirming *Attorney-General v. Western Union Tel. Co.*, 33 Fed. Rep. 129.

³ *Ibid.*

has the right to occupy a street which is a post-road, yet, as there may be other telegraph, and especially telephone companies not protected from State taxation of this kind by acts of Congress, the decision may be quoted as showing that the judicial courts will not regard a license tax of *five dollars* per pole as *unreasonable*, and an ordinance imposing it therefore void.¹

§ 48. **Municipal Control as to the Mode of Suspending or Laying Telegraph Wires.**—Recollecting that the rights granted to telegraph companies by the act of Congress already quoted is subject to the reasonable exercise by the States of their police power,² either exerted by the State directly in the form of a statute, or by a municipal corporation chartered by the State, enacted in pursuance of the authority conferred by its charter, we are prepared to accept the view of the Supreme Court of Pennsylvania, that a city has the right, if so empowered by its charter, to supervise and control, by such ordinances as may seem proper, the erection of poles upon and the stretching of wires along its streets;³ provided, of course, that such regulations do not destroy or substantially abridge the rights secured by the Federal statute. Acting on this view, the Circuit Court of the United States for the Southern District of New York has held that State legislation compelling electric wires in the streets of a city to be *placed under the surface* of the

¹ *Western Union Tel. Co. v. Philadelphia (Pa.)*, 12 Atl. Rep. 144. For instances of municipal by-laws void because unreasonable, see 1 *Thomp. Corp.* § 1024.

² *Ante*, §§ 1, 4.

³ *Western Union Tel. Co. v. Philadelphia (Pa.)*, 12 Atl. Rep. 144; affirming, s. c., 11 Phila. 327.

streets, although such streets, being letter-carrier routes, are all *post-roads*, is a valid exercise of police power, and is not an unlawful attempt to regulate commerce, or an invasion of the rights of a telegraph company as a business agency of the general government, under the Act of Congress already set out.¹ The court also held that a State statute confirming a contract between commissioners for placing electric wires under ground and a subway company, to lay subways for such wires, is none the less an exercise of police power because it gives to such company special privileges, but no exclusive privilege or franchise.² It was further ruled in the same case that where the public authorities are not acting *mala fide*, the exercise of their discretion will not be reviewed in a court of equity on the allegation of a telegraph company that they are attempting to place its wires in insufficient and defective subways.³

§ 49. **Futility of Attempts at Statutory Regulation.**—A very slight acquaintance with this subject must convince any person of the futility of attempts at minute statutory regulation. In the present state of our knowledge on the subject of electricity, any regulation must be more or less experimental. The whole thing should be remitted to the control of the municipal corporations, under rules to be established by boards of competent experts and enacted into municipal ordinances. To this end municipal corporations should be fully empowered to deal with the matter, subject, of course, to any

¹ *Western Union Tel. Co. v. New York*, 3 L. R. A. 449; s. c., 2 Interstate Com. Rep. 533; 6 Rail. & Corp. L. J. 105; 38 Fed. Rep. 552.

² *Ibid.*

³ *Ibid.*

such general regulations or restraints as experience may have shown to be necessary, and also subject to the superintendence of the judicial courts by the usual methods of injunction, mandamus, *quo warranto* and certiorari. This jurisdiction will be exercised by the courts very sparingly, and only in plain cases of acting without power, or in excess of power, or in such a manner as to infringe the undoubted rights secured by the constitutions, State or Federal, or by paramount law. In Great Britain an attempt has been made to deal with the subject in two statutes known as the Electric Lighting Acts 1882¹ and 1888.² The latter act is an amendment of the former, and they are to be read together as one act. These statutes apply both to Great Britain and Ireland. Although the Parliament of that country sits almost continuously, and although its methods of legislation are far superior to those of American legislatures, it was found impracticable to deal with the subject except in a general way, and it was found necessary to commit nearly all matters of detail to the regulation of the Board of Trade. In discharging the duty thus committed to it, that body has established an elaborate and minute system of rules and regulations, which have become the foundation of a very practical and useful treatise on the subject.³

¹ St. 45 & 46 Vict. ch. 56.

² St. 51 & 52 Vict. ch. 12.

³ The learned authors of the work above referred to, say this in their preface: "By the two Electric Lighting Acts, everything (as we have said) is practically left to the Board of Trade. In 1882 Parliament had not sufficient information to legislate with scientific precision on the professed subjects of the statute of that year: and in 1888 they had not time to do so, or thought it inexpedient. Consequently it is the Board of Trade, and not Parliament, who have built up the really effective and practical (though nominally auxiliary) body of legislation to

§ 50. **Dangers to be Provided against by Such Regulations.**—While the opinions of a non-expert are of little value, yet one who has considered attentively the disclosures of the adjudged cases on questions of electrical interference, may venture to suggest to municipal bodies called upon to frame such rules, that the principal dangers to be guarded against are the following :

1. The danger of what is known as "*conduction*" or *leakage* which takes place where the ground is used for the return circuit of different currents. In such cases one of the currents will cross to the other and interfere with it. Thus, if an electric railway uses the ground for its return current, and a neighboring telephone line also uses the ground for its return current, there is danger that the more powerful current of the railway company will cross to that of the telephone company and submerge it, so to speak. In such a case, if the railway current

which undertakers must look for guidance, and the latest version of which appears in the Model Order. And it is the various rules, regulations and reports framed and issued by that department under powers conferred by the Acts, rather than to the provisions of the Acts themselves (which are for the most part either colorless or unnecessary), that we must consult in order to ascertain the present procedure and practice relating to applications for and to the execution and working of powers under the various kinds of statutory concessions authorized in outline merely by the Acts. For it is to this department that Parliament has almost entirely delegated the duty of working out its own vaguely expressed and unparticularized intentions. Consequently, though the Act of 1888 has not directly imported any lengthy or complicated materials, it has indirectly given rise to them; for, by making practicable the Act of 1882 (which prior thereto had almost become a dead letter), and by reviving applications thereunder, it has necessitated the large body of ancillary legislation to which we have alluded; and it is the discussion and elucidation of this ancillary legislation which the present edition is largely concerned with, and which is responsible for the almost entire alteration of the original contents, and for the increase in the original bulk of the work." Bower & Webb *Electric Lighting*, Preface, pp. 9, 10.

were entirely uniform, no injurious effect would, it seems, be produced by the interference. But as the railway current is seldom or never uniform, the effect is to produce in the telephone instruments loud buzzing noises, which sometimes wholly interfere with telephonic communication; also to ring the bells of the annunciators in the offices of customers when there is no call from the central office; and, moreover, to cause a great number of the annunciators at the central office to fall at once, so that the persons on duty cannot tell who, if any one, is calling. This species of interference can only be avoided by compelling one or the other of the interfering parties either to use an overhead wire for its return current, or otherwise to change its system so as to desist from using the ground for its return current.¹ We have seen that different courts have dealt differently with this species of interference, some putting the expense of making the change on the company establishing its works at the later date, on the theory that priority in time gives priority of right; while Mr. United States District Judge (now Mr. Justice) Brown, in an exceedingly lucid opinion, has taken the opposite view.²

2. The danger of the disturbance of the current on one by the current on another parallel wire, through what electricians, for want of a better name, call "*induction*." This is no doubt a phenomenon of the same general nature as that spoken of in the preceding paragraph under the name of "*conduction*" or leakage. Both consist in electrical energy passing from one wire to another—in

¹ *Ante*, § 44.

² *Ante*, § 44.

the one case through the earth, which is a ready conductor, and in the other through the atmosphere, which is an imperfect conductor. Experience shows that the inconveniences to be apprehended from atmospheric induction are not serious, except where two wires parallel each other for long distances; and that the danger of induction is, other things being equal, in proportion to the distance through which the two wires run parallel to each other. The usually slight danger to be apprehended from atmospheric induction is no doubt due to the fact that the atmosphere is, even when saturated with moisture, a very imperfect conductor of electricity. For instance, electric light wires, which transmit a powerful current, are frequently strung for considerable distances on the same cross-bars with telephone wires, which transmit a feeble current, without other inconvenience than producing in the telephone receiver a faint murmur of the dynamo which supplies the electrical energy to the lighting wire. One who will take pains to observe in almost any American city where these wires have not been put under ground, will see wires of different sizes strung on the same poles for considerable distances in close proximity with each other. The danger of induction is also greater, in proportion to the strength of the current, from a telegraph wire to another electric wire; for, as already stated with reference to earth induction, there is little danger from this source except in the case of an unsteady current, and the telegraphic current is constantly being broken in the process of telegraphing; in other words, it is what is not inaptly called "a make-and-break current." It is

also to be observed that this species of danger can be almost entirely avoided by the insulation of the parallel wires. It is for this reason that many wires are not infrequently made into one cable where they are separated by insulating material. It is for the same reason that many cables which contain several wires may be conducted through an under-ground tube or subway, without danger of this species of interference.

3. The danger of wires coming in actual contact with each other by reason of *breaking*. Where this takes place the consequent rubbing will quickly wear off the insulating covering, with which these wires are generally protected, and the current from the one is consequently transmitted to the other, which becomes as to it what electricians denominate a "second ground." This source of danger, where these wires are suspended through the air in populous cities, threatens the most serious consequences to life and property. If, for instance, the powerful current of an electric light wire is in this way taken up by a telegraph wire, it is liable to burn the telegraphing instrument connecting with such wire, to kill the operator at work at such instrument, and even to set fire to the building of the telegraph company. The Western Union Telegraph Company has had several instruments burned out in this way in St. Louis; and finally its building took fire and burned, not long since, from fire communicated from its electrical wires—though, it is understood, not in consequence of wires receiving more powerful currents from interference with other wires. Some effort has been made to minimize this source of danger by the adoption of a device called a

“*fusible plug*,” which consists, roughly speaking, in inserting in the telegraph or telephone wire, near where it enters the building sought to be protected, a joint or plug of lead, pewter, or some other metal or amalgam which fuses at a low temperature. It is claimed in behalf of this device, that when the wire which contains it is seized by the more powerful current of the interfering wire, it instantly melts, causing the wire to separate. But, admitting all that has been claimed for this device, three observations seem to diminish the prospect of its being found adequate to the end intended: (1.) The insertion in a wire, exposed to the tension of its own weight and to the strain produced by the wind, of a joint or plug of soft metal is likely to weaken it and render it liable to break at that joint. (2.) If it is so contrived as to melt and break under a current not greatly in excess of that which the wire ordinarily carries, then there is danger of its melting and breaking under the ordinary current of the wire: which seems to show that there is an intermediate excess of current between the ordinary current of the wire and the current at which the plug will fuse, against which it affords no protection. Has experience proved that danger may not flow from this intermediate excess of current? (3.) In any case where the plug or joint causes the wire to break through its intended operation under the influences of a powerful current, the danger is not done away with: it is merely shifted from the telegraph or telephone company and its servants to the public passing by on the street. It may instantly kill a foot passenger on the street by coming in contact with him, especially if the weather is

wet, or the conditions are otherwise such that his body offers a "second ground" to the electric current with which the wire is charged. These dangers cannot be minimized; experience actually magnifies them. Near the court house in St. Louis, in the winter of 1889-90, two horses attached to a street-car loaded with passengers, going at full trot along the street, were instantly killed by coming in contact with an electric light wire which had become broken in consequence of being weighted with a heavy sleet which had fallen during the previous night.

4. The danger of such wires coming into actual contact by "*sagging*." This danger is of the same nature as that which springs from breaking, though far more remote, and consequently less serious. The ordinary land wires used by telegraph companies are made of iron. They do not expand much in warm weather, and they consequently are not liable to sag to such an extent as to threaten danger in ordinary cases from coming in contact with other wires. But they are much more liable to break than are copper wires. They frequently contain flaws into which the water insinuates itself, causing rust and increasing weakness, until they finally separate—often in storms of wind, but more commonly in storms of sleet in which they become heavily weighted with ice. If there are suspended beneath them the trolleys of electric railways, or the wires of electric lighting or electric motor companies, they are liable to take up the more powerful current and transmit it, on the one hand, to the telegraph office, or on the other hand, to an accidental passer-by on the street. On the other hand, the copper wires

which are generally employed by other electrical companies are far more perfect in their structure, less liable to be affected by rust, and hence less liable to break; but they expand more under the influence of heat; they gradually stretch under their own weight; and hence they are much more liable to sag than are iron wires. If, therefore, the copper wire used by an electric lighting motor or tramway company should, by sagging, come in contact with a telegraph or telephone wire suspended beneath it, and if at the point of contact the insulating covering of both wires should become worn off (as would be likely to happen if the contact were long continued), or if the weather should happen to be wet so that the coverings of the interfering wires should lose a portion of their insulating property, a current of electricity might be transmitted to the lower wire sufficiently strong to set fire to the switch-boards or to the telegraphic instruments with which it might be connected. Experience shows that the extent of the sagging of the copper wires usually employed by electric lighting companies in such a climate as that of the central American States, between the limits of greatest contraction by cold and greatest expansion by heat, is from one to two feet in one hundred and fifty. This limit of sagging suggests the limit of danger, and hence the limit of proximity of electric wires when suspended below electric light wires or other copper wires carrying a powerful current. The above facts also suggest the conclusion that the danger from sagging can be minimized by a reasonable inspection, which is demanded by the principles of the common law, and which should be enforced by suitable municipal regulations.

The patrolmen of the city police force ought to be enjoined with the duty of inspecting such wires and reporting any breaking or dangerous sagging, and they ought to receive such instruction as will enable them properly to discharge this duty. Electric light, motor and tramway companies ought also to inspect their overhead wires at least twice a day. It is believed that this is generally done by well managed companies, and that, when an undue sagging is discovered, a person employed for the purpose at once "takes up the slack."

5. The danger from the escaping of electric currents in consequence of the effect of *storms*. Water, whether frozen or unfrozen, is a good conductor of electricity. The covering of these wires, which is commonly used, loses some of its insulating properties when wet, whereby some of the current is liable to escape and descend to the earth, down the wet surface of the pole. Persons leaning in wet weather against poles which carry electric wires have received shocks in this way. This danger is greatly increased where the water falls in the form of sleet and freezes on the wires and poles. A single flaw in the insulating covering of the wire transmits the current to the icy conductor with which it is covered. The ice is frequently continuous from the wire down the pole into the ground. Thus released from its insulation no one—at least no one not an expert—can tell in what direction the subtle fluid will dart. Where the wires break from the weight of ice which they carry, the danger in populous cities, as already suggested, is increased.¹ It is

¹ During a recent wind storm in the city of Pittsburgh, the apprehended danger from this source became so great that the municipa

believed that no device can avert this species of danger, except that of putting all electric wires under ground in populous urban districts. As already seen,¹ regulations of this kind are now being enforced in New York, and, according to statements in the newspaper press, the same is true in some other cities.

§ 51. **New York Board of Electrical Control.**—In 1885 the legislature of New York passed an act creating “a board of commissioners of electrical subways in and for the State and county of New York;”² and, two years later, another act constituting the same body a board of electrical control in such city and county, and vesting in it all the powers and duties conferred or imposed on the former board “in respect to or affecting the placing, erecting, construction, suspension, maintenance, use, regulation or control of electrical conductors or conduits or subways for electrical conductors in said city.”³ Under this later act, the duty and responsibility of determining all questions as to the placing, erecting, constructing, suspension, use, regulation or control of electrical conductors in the city, belongs to this board; and it has been held that, so construed, the act is constitutional, and that the action of the board should not be interfered with by injunction.⁴ It has further been held that the authority conferred upon this board of electrical control by section four of the last named act, to grant

authorities required all electric railway companies to suspend their operations.

¹ *Ante*, § 48.

² New York Laws of 1885, ch. 499.

³ N. Y. Act, June 25, 1887; Laws 1887, ch. 716, p. 928, § 1.

⁴ *United States Illuminating Co. v. Hess*, 19 N. Y. St. Rep. 883; s. c., 3 N. Y. Supp. 777.

or refuse permits for the continuance of electrical conductors above ground, where no subways have been provided therefor, is a valid exercise of the police power, to the extent of regulating the continuance of such conductors as have become *dangerous* by reason of defective insulation.¹

§ 52. **Mandamus to Compel City to Designate Places for Erecting Electric Light Poles.**—From a recent decision of the Supreme Judicial Court of Massachusetts, in a case in which the opinion of the court was prepared by the late Mr. Justice Devens, and approved and delivered by the court after his death, the principle may be extracted that, although a statute *authorizes* the mayor and aldermen of a city to designate where the poles of an electric lighting company shall be set, yet in view of the local character of such companies, of the dangers likely to arise from the erection of their lines, to travelers in the streets, and of the other demands by the general public for the use of the streets,—a mandamus will not be awarded to compel the performance of this duty.²

§ 53. **Power of a Municipal Corporation to Own an Electric Light Plant.**—The power conferred on municipal corporations over their streets generally extends to lighting them, so as to make them safe for travelers at night; and in addition to this power the power to own property carries with it, by implication, the power to own an electric light plant for the purpose of generating electricity to be used in lighting its streets.³ But as municipal corpora-

¹ United States Illuminating Co. v. Grant, 7 N. Y. St. Rep. 788.

² Suburban Light, etc. Co. v. Boston (Mass.), 26 N. E. Rep. 447.

³ Mauldin v. Greenville (S. C.), 8 L. R. A. 291; s. c., 11 S. E. Rep. 434.

tions are not, by any sort of implication, created for the purpose of engaging in private business for profit, if a city attempts to own and operate an electric light plant for the purpose of lighting private dwellings, it must be able to put its finger on some clause of its charter authorizing it so to do.¹ If a city, for any municipal purpose, adopts and uses a *patented device* without a license from the owner, it will be liable to him for infringement, to the same extent as an individual; for such corporations are no more privileged to take private property for their uses without paying for it, than individuals are.²

¹ *Mauldin v. Greenville, supra.*

² It has been held that the city of New York may be sued in the United States Circuit Court for an infringement of a patent, without regard to whether a *demand* has been made on the city comptroller under the State statute requiring the presentation of claims before suit brought. *Gamewell Fire Alarm Tel. Co. v. New York*, 31 Fed. Rep. 312.

ARTICLE II.—STATUTES.

SECTION.

54. Recent Statutes Regulating Electrical Companies.
55. Statutes Authorizing the Laying of Such Wires Under Ground.
56. Statutes Committing the Subject to the Regulation of Municipal Corporations.
57. Statutes and Municipal Regulations Authorizing the Stringing of Wires on Existing Poles.
58. Statutes Restraining Invasions of Private Property.
59. Statutes Authorizing the Use of Roads and Streets by Telegraph and Telephone Companies.

§ 54. **Recent Statutes Regulating Electrical Companies.**—The employment, under recent inventions, of an agency so dangerous as electricity, has rendered the public regulation of electric lighting, electric railways, and other machines which employ electrical energy, extremely necessary. The difficulty of intelligent and beneficial statutory regulation consists in the fact that our knowledge of the subject is in its infancy. Some things are, however, known of electricity. One of these things is, that this energy, whether it consists of the waves or vibrations of a subtle medium, or of currents of actually moving matter—runs only in a *circuit*; that is to say, it will not flow unless it can find a conducting substance through which it can return to the point from whence it started. A man may, with his moist hand, take hold of the end of the largest wire, charged with the most powerful current, if he can

make sure that his body is completely insulated—that is to say, that the current cannot proceed on its circuit through his body. Unless it can so proceed, it is inert, like so much water in an impervious reservoir. This well-known law of electricity has induced the legislature of one State to enact the following statute: “It shall be the duty of each and every electric light, power company, and of each and every person engaged in the transmission of electric energy within this State, to provide, by suitable insulation, return wires, or other means against injury to persons or property, by leakage, escape or induction of any and every current of electricity;” neglect of such duty entitles persons injured to enjoin further use of such current until the provisions have been complied with.¹

§ 55. **Statutes Authorizing the Laying of Such Wires Under Ground.**—A statute of Maryland provides for the formation of corporations for the constructing and operating of telegraph and telephone lines within that State.² Another statute of the same State provides for the formation of corporations “for transaction of any business in which electricity over or through wires may be applied to

¹ Wis. Act, April 15, 1889; Acts 1889, ch. 375. The Pennsylvania act for the incorporation and regulation of electric light, heat and power companies (Act April 29, 1874), amended Act May 8, 1889; L. 1889 No. 153, p. 136. The legislature of Kentucky recently passed a general act regulating the use of streets by companies supplying electricity for any purpose, and vesting control in local authorities to prescribe necessary regulations; also providing for damages for injuries to property. Act March 22, 1887; Pub. Acts 1887, ch. 33, p. 676. Section 3603 of the General Statutes of the same State, which punishes the obstructing of horse railroad companies in the use of their roads or tracks, has recently been amended so as to include electric and cable railroad companies. Act March 20, 1889; Gen. L. 1889, ch. 44, p. 24.

² Md. Laws 1884, p. 481, amending the Revised Code of 1878, p. 317.

any useful purpose.”¹ This latter statute contains the following new sections:

“Any corporation formed under class eleven of section twenty-four of the act of which this act is amendatory, or under class eleven A. of section twenty-four of the act of which this act is amendatory, as said section and class may have been or may be hereafter amended, shall have the powers which are conferred upon telegraph companies incorporated under said act, of which this act is amendatory, by the one hundred and twenty-ninth section of said last mentioned act, and may construct and lay any part of its said line or lines under ground, on any route on which it is authorized to construct such lines, in whole or in part, above ground, and may acquire by condemnation any easements or interests in land which may be necessary to give effect to the purposes for which such corporation was formed, in the manner set forth in sections one hundred and seventy to one hundred and seventy-five, both sections included, of the said act of which this act is amendatory.”² “*Provided, however,* That all corporations incorporated, or to be incorporated, by virtue of said section twenty-four, class eleven, or by virtue of said section twenty-four, class eleven A., except such corporations as are now in practical operation and have laid or constructed their lines, or any part thereof, in the City of Baltimore, shall, before using the streets or highways of Baltimore City, either the surface or the ground beneath the same, obtain a special grant from the General Assembly of Maryland, and the assent and approval of the Mayor and City Council of Baltimore city.”³

§ 56. **Statutes Committing the Subject to the Regulation of Municipal Corporations.**—Statutes have already been enacted in some of the States which commit the subject to the regulation of municipal corporations. Thus, a statute of Pennsylvania enacts: “That, before the exercise of any of the powers given under this act, application shall first be made to the municipal authority of the city, town or borough, in which it is proposed to exercise said powers, for

¹ Md. Laws 1886, p. 265, § 24.

² *Ibid.* § 175 A.

³ *Ibid.* § 175 B.

permission to erect poles, or to run wires on the same or over, or under any of the streets, lanes or alleys of said city, town or borough, which permission shall be given by ordinance only, and may impose such conditions and regulations as the municipal authorities may deem necessary.”¹ By statute in Rhode Island, Town Councils and City Councils may, from time to time, make and ordain all ordinances, for their respective towns, not repugnant to law, which they may deem necessary “to regulate the putting up and maintenance of telephone and other wires and the appurtenances thereof.”² A statute of Vermont also enacts as follows:

“Persons or corporations erecting telegraph or telephone wires across a highway in a town, shall either place them under ground, or at such a distance above the surface of the highway that they may not prove an obstruction to travel in the highway. If such wires, already erected across a highway in a town, are, in the opinion of the selectmen, an obstruction, the selectmen may direct the same to be placed under ground, or at a greater height.”³

“If a wire is erected in violation of the directions of the selectmen, or is not altered, when directed to be altered by the selectmen, the selectmen may remove such wire, and may recover the expense of such removal, of the persons, or corporations, owning such wire, or who, by themselves or their agent, caused the same to be erected in violation of the directions of the selectmen, by an action brought in the name of the town.”⁴

A statute of Connecticut enacts:

“The selectmen of any town, the common council of any city, and the warden and burgess of any borough shall, subject to the

¹ Penn. Laws 1885, p. 164, § 4.

² Gen. Stats. R. I. 1882, ch. 38, § 115.

³ Vt. Laws, 1884, p. 22, § 1.

⁴ *Ibid.* § 2. Another statute of the same State provides that telegraph and telephone poles shall be suitably *painted* to the satisfaction of the town authorities, imposes a penalty for a failure so to do, and punishes the posting of bills on the same. Vt. Laws, 1882, p. 75, §§ 1-3.

provisions of the preceding section, within their respective jurisdictions, have full direction and control over the placing, erection, and maintenance of any such wires, conductors, fixtures, structures, or apparatus, including the re-locating or removal of the same, and including the power of designating the kind, quality, and finish thereof, and may make all orders necessary to the exercise of such power of direction and control, which orders shall be in writing and recorded in the records of their respective communities, but shall be subject, nevertheless, to the right of appeal by said company to a judge of the Superior Court, who, after a hearing, upon due notice to all parties in interest, shall, as speedily as possible, determine the matter in question, and affirm, modify, or revoke said order.”¹

The Revised Statutes of Missouri enact as follows:

“The mayor and aldermen, or board of common council of any city, and the trustees of any incorporated town, through which the lines of any telephone or telegraph company are to pass, may, by ordinance or otherwise, specify where the posts, piers, or abutments shall be located, the kind of posts that shall be used, the height at which the wires shall be run; and such company shall be governed by the regulations thus prescribed; and after the erection of said telephone or telegraph lines, the said mayor and aldermen, or board of common council, and the trustees of any incorporated town, shall have power to direct any alteration in the location or erection of said posts, piers, or abutments, and also in the height at which the wires shall run, having first given such company or its agents opportunity to be heard in regard to such alteration.”²

A statute of Nebraska enacts:

“The Mayor and Council shall have power to regulate and provide for the lighting of streets, laying down gas pipes, and erection of lamp posts, electric towers, or apparatus, and to regulate the sale and use of gas and electric lights, and fix and determine the price of gas, the charge of electric light, and the rent of gas-meters within the city, and regulate the inspection thereof, and to regulate telephone service and the use of telephones within

¹ Gen. Stats. Conn. 1887, § 3946. Two subsequent sections commit a superintending jurisdiction to the Superior Court.

² Mo. Rev. Stats. 1879, § 888; 1889, § 2730.

the city, and to fix and determine the charge for telephones and telephone service and connections, and to prohibit or regulate the erection of telegraph, telephone, or electric wire poles in the public grounds, streets or alleys, and the placing of wires thereon, and to require the removal from the public grounds, streets or alleys of any or all such poles, and require the removal and placing under ground of any or all telegraph, telephone or electric wires.”¹

A statute of New Hampshire contains the following provisions:

“Whenever any such proprietors shall desire to erect their poles or structures, or to stretch their wires, they may apply by petition to the Mayor and aldermen of any city, or the selectmen of any town in which such poles or structures are to be erected or wires stretched, to locate the route of the lines for such telegraph, telephone, or electric lighting, on, over, and along the public highways in such town or city, and to grant license therefore, upon such conditions as the public good may require.”²

“The Mayor and alderman, or the selectmen, shall have the power to grant such license, and may fix and limit the size and location of such poles and structures, their distances from each other, the height from the ground that such wires may be stretched, and the number of wires that may be so used, and the time for which the license shall continue in force, and may revoke the same whenever the public good shall so require, and from time to time, upon like application of such proprietors, or by any person whose rights or interests are affected, may alter and change the location of such poles or structures, and the height and size of the same, as well as the height and number of wires, or may revoke the said license, if proper cause is shown; and all proceedings of the Mayor and aldermen, or selectmen, under this act, shall be subject to the supervision of the Supreme Court, on application of any person interested or aggrieved.”³

“No such poles or structures shall be erected, or wires stretched in any way so as to interfere with any other similar structure.”⁴

“If any person shall be aggrieved or damaged by the erection of such poles or structures, or by the stretching of such wires, or by the use made of the same, he may apply to the Mayor and alder-

¹ Gen. Laws Neb. 1887, p. 123, § 50.

² N. H. Laws 1881, p. 472, § 3.

³ *Ibid.* § 4.

⁴ *Ibid.* § 5.

men, or the selectmen, to assess the damages which he claims are occasioned thereby, who shall give notice to such proprietors and all others interested, and after hearing all parties may award such damages as may be legally and justly due.¹

"If said Mayor and alderman, or selectmen, shall neglect or refuse to make such award, or either party shall be dissatisfied therewith, or said proprietors shall neglect or refuse to pay the same within thirty days after such award is made, either party may apply to the Supreme Court for relief, and like proceedings shall be had as in case of appeals from the laying out of highways and the assessment of damages therefor.²

"Proceedings, as provided by this act, may be taken on petition to the Mayor and aldermen, or selectmen, in case any proprietors aforesaid shall desire to lay their wires under the surface of any highway, or in case any person interested or affected by such poles, structures or wires, or the use made thereof, shall petition therefor.³

"Similar proceedings may be had by any such proprietors for locating and licensing any such telegraph, telephone, or electric lighting lines, already constructed or for changing or altering the location of such lines as may have been heretofore erected.⁴

"Nothing herein contained shall exempt any such proprietors from liability for any unlawful entry, trespass, or damage already made or committed, nor from any liability or damage that may occur from want of care or from negligence in erecting or maintaining such poles, structures or wires.⁵

"Such proprietors of any telephone or telegraph lines shall open and maintain at some convenient point or points, offices or places where any person desiring so to do may use such telephone or telegraph line for communication to all points reached by such line or its connections, on payment of a reasonable fee for such use; and if any such proprietors shall neglect or fail so to open and maintain such offices or places, any person aggrieved may apply to the Supreme Court, by petition for redress, and the court shall make such orders and issue such decrees as justice may require.⁶

¹ N. H. Laws 1881, p. 472, § 6.

² *Ibid.* § 7.

³ *Ibid.* § 8.

⁴ *Ibid.* § 9.

⁵ *Ibid.* § 10.

⁶ *Ibid.* § 11.

"Such proprietors of any electric lighting apparatus or lines shall furnish the means of lighting by such electric light to all persons within the reach thereof and applying therefor, upon similar terms and conditions, without discrimination and at reasonable rates; and any person aggrieved by the neglect or failure to furnish such means, at such rates, may apply to the Supreme Court by petition, for redress, and the court shall make such orders and decrees as justice may require."¹

A statute of New Jersey is as follows:

1. "That whenever any telegraph or telephone company, organized by virtue of the act to which this is a further supplement, or by virtue of, any special act, shall apply to the Common Council, township committee, or other legislative body of any city, town, township, village or borough in this State (the Common Council, township committee, or other legislative body of which is authorized by law to take and appropriate lands or real estate for the opening, laying out or constructing streets therein, and to make awards for lands or real estate taken therefor, and to levy assessments for benefits or expenses of such improvements, by a board of assessment or otherwise), through which it is intended to construct or extend any telegraph or telephone line, for a designation of the street, streets or highways, in or upon which the posts or poles of said company may be erected, it shall be the duty of such Common Council, township committee or other legislative body to give to such company a writing, designating the street, streets, or highways in which the posts or poles of said company shall be placed, and the manner of placing the same, subject in other respects to the provisions of the act to which this is a supplement; the street, streets or highways to be designated as aforesaid shall be such as form a practicable and suitable continuous route for the line of said company through such municipality, commencing and ending upon a public highway, and shall be designated with due regard to the improvement of facilities for telegraphic or telephonic communications; in case such Common Council, township committee, or other legislative body shall not, within fifty days from the time of the making of such application, give to such company a writing, designating the street, streets or highways in which the posts or poles of such company may be erected, and the manner of placing the same, as hereinbefore provided, it shall be lawful for such company to apply to the Circuit Court of

¹ N. H. Laws 1851, p. 472, § 12.

the county in which such city, town, township, village or borough is situate, or to the judge thereof in vacation, and such court or the judge thereof, after a hearing upon twenty days' notice to such Common Council, township committee or other legislative body, which notice shall be published at least once a week, for two weeks, in a newspaper in which the ordinances of such city, town, township, village or borough are published according to law, or in case there is no such official newspaper, then in a newspaper published in the county, to be designated by said court or judge, shall, as speedily as possible, hear the matter in question, and may, in the discretion of said court or judge, designate the street, streets or highways in which the posts or poles of such company may be erected and the manner of placing the same, which designation shall have the same force and effect as if made by the legislative body of said city, township, village or borough.

2. "And be it enacted, That it shall be unlawful for any telegraph or telephone company to construct or extend any telegraph or telephone line, or to erect any posts or poles therefor, in any city, town, township, village or borough, having the powers enumerated in the first section of this act, without first obtaining such designation of their route, and then only upon the street, streets or highways so to be designated."¹

The Revised Laws of Vermont contain these provisions:

"Persons associated together to erect a line of telegraph wires in this State, may set, erect and maintain the posts and other necessary fixtures therefor, in and along any highway; but the same shall be done so as not to interfere with the public convenience in traveling on such highway, or repairing the same."²

"If it is found inconvenient or inexpedient, to erect such telegraph wires agreeably to the preceding section, the selectmen in the town where such difficulty arises shall determine, upon application, where, and in what manner, such wires shall be erected, giving notice to the parties in interest, or their agents, and shall certify their decision, and cause the same to be recorded in the town clerk's office."³

¹ N. J. Laws, 1888, ch. 337, amending Act of April 1, 1887 (Laws 1887, ch. 87). This last act also amended the general act "to incorporate and regulate telegraph companies." N. J. Rev. 1877, p. 1174. See also N. J. Supp. p. 1022.

² Rev. Laws Vt. 1880, § 3633.

³ *Ibid.* § 3634.

“If it is found desirable to erect such line of telegraph, in and along the streets of a village, or in front of and near residences of any persons, and such persons object thereto, they may apply to the selectmen of such town, or officers of such village, who shall determine through what streets the same shall pass, or in what manner, if at all, such objections may be obviated; and such decision shall be final, notice being given as required in the preceding section.¹

“When such selectmen, or other officers, are called upon to act, they shall be paid one dollar each a day; and the decision of a majority of them shall be final; and the expenses incurred thereby shall be paid by the persons erecting such telegraph line.²

“When, in the erection of a telegraph line, the owner or occupant, of lands or tenements sustains, or is likely to sustain, damage thereby, the selectmen of the town shall appraise such damage, and the same shall be paid before the line is erected; and the decision of such selectmen shall be final, notice being given as before required in this chapter.³

“Towns may construct, for their own use, telegraph lines upon and along the highways and public roads, within their limits, subject to the provisions of this chapter, so far as the same are applicable.⁴

“Selectmen may authorize persons, upon such terms as they prescribe, and subject to the provisions of this chapter, as far as applicable, to construct for private use, a telegraph line along the highways of the town.”⁵

§ 57. Statutes and Municipal Regulations Authorizing the Stringing of Wires on Existing Poles.

—In order to prevent the needless multiplicity of poles on the streets of cities, towns and villages, which obstruct public travel and also obstruct and tangle firemen in the putting out of fires, statutes have been enacted and municipal regulations established providing for the suspension of the wires of new companies on the poles of companies already

¹ Rev. Laws Vt. 1880, § 3635.

² *Ibid.* § 3636.

³ *Ibid.* § 3637.

⁴ *Ibid.* § 3642.

⁵ *Ibid.* § 3643.

existing. This is a condemnation of private property for public use, and it can only be done by or under authority of an act of the legislature; nor can it, under American constitutions, take place at all without the payment of just compensation to the companies whose poles are thus used. Whether it can take place at all, to the exclusion of the right of the company owning the poles to fill all the cross-bars which the poles will carry with its own wires, if so many are necessary to the proper conducting of its own business, must also be regarded as very doubtful. A statute of this kind exists in Vermont in the following language :

“Whenever any persons or corporations are about to erect a line of telegraph or telephone wires in and along a highway within any town, city, or incorporated village, in and along which a line of poles has already been erected by other persons or corporations, for a similar purpose, the selectmen of such town, or principal officers of such city or village, shall have the right to permit, and may require, the persons or corporations about to erect a new line, to attach their wires to the poles already standing, as provided in the following section.¹

“Said selectmen, or principal officers, shall ascertain, as near as may be, the cost of erecting such line of poles, and shall direct such persons or corporations as they may require to use said poles, to pay to the owners of the line already erected, a fair proportion of such expense, not to exceed one-half the estimated original cost of construction; and in no case shall said poles be used until the owners of the new line shall tender to the original owners of said line of poles, the amount so directed by said officers. And if a pole or poles, used by two or more persons or corporations, shall be required to be repaired, or renewed, the expense thereof shall be borne equally by the persons or corporations using the same.²

“Said officers shall give written notice to the proprietors of both the old and new lines of all their requirements in the premises, and

¹ Rev. Laws Vt. § 3645.

² *Ibid.* § 3646.

shall also lodge a copy of said notice in the town or city clerk's office, as the case may be.¹

"The proprietors of any such line of poles so required to be used by any other person or corporation, shall not take down, or alter, the position of such poles, without obtaining permission of all parties who may have acquired a right to use said poles, or the permission of the town, city, or village officers aforesaid; and any person or corporation, injured by the violation of this section, may maintain an action on the case, founded on this statute, to recover the amount of such injury.²

"The selectmen, or other officers, shall receive one dollar each, a day, for their services under sections two and three [*ante*, §§ 3646, 3647]; and the decision of a majority of them shall be final. All expenses incurred, shall be paid by the persons, or corporations, erecting such new line."³

Another statute of the same State enacts :

"Persons desiring to attach a telephone line to the poles maintained by a telegraph company, may apply by petition in writing, to the county court of the county in which, or partly in which, the line of poles, to which it is desired to attach such wires, is situated, stating that they wish to attach a line of wires to such poles. The court so petitioned to, shall appoint three disinterested persons, as commissioners, who shall make examination, and determine whether such line can be so attached, without injury to the company owning the poles, and if they are of the opinion that they can be so attached, shall so report to the court, and shall also report what, in their opinion, would be a fair annual compensation to be paid by the persons desiring to attach such telephone lines, for the use of such poles. The court may establish such report, or they may reject the same, and appoint new commissioners, to re-examine and report. If a report is finally established, recommending that the telegraph company allow the use of its poles, for a compensation specified in such report, such company shall so allow the use of their poles, on tender of such compensation, and if they hinder, or obstruct persons, so authorized to attach their lines thereto, may be proceeded against by the court establishing the report, as for contempt.⁴

¹ Rev. Laws Vt. 1880, § 3647.

² *Ibid.* § 3648.

³ *Ibid.* § 3649.

⁴ Vt. Laws, 1882, p. 74, § 1.

"The petition, with a citation for that purpose, shall be served on such telegraph company, at least twenty days before the sitting of the court to which such petition is preferred.¹

"Such telephone wires, when affixed to the poles of a telegraph company, under the provisions of the preceding section, shall be put up in such a manner as not to interfere with wires already affixed to such poles."²

Such a regulation has been established by the Board of Public Improvements of the City of St. Louis, under the authority of municipal ordinances, which prohibits the placing of any wires, tubes or cables, conveying electricity, along or across any of the streets, alleys, or public places in the City of St. Louis, except on condition (among other things) of giving a penal bond in the sum of \$20,000 "that he or it will comply with all the regulations made by the Board of Public Improvements having reference to the subject embraced in this or any other ordinance for the purpose herein named." Among the regulations of the Board of Public Improvements thus imposed upon electric companies as a condition precedent so to place their wires, tubes or cables, is the following: "No permit shall hereafter be granted for the erection of poles unless the party making the application shall, in writing, agree: 1. To erect poles of such dimensions as to admit of at least fifteen cross-bars of the usual size, at the ordinary distance, being placed thereon, except by special permission of the Board. * * * 3. That it will grant to any other company requiring electric light wires for its business, the right to use one or more of the cross-bars on its poles, at an annual rental of forty cents for a half cross-bar, and sixty

¹ Vt. Laws 1882, p. 74, § 2.

² *Ibid.* § 3.

cents for a full cross-bar, except in cases where the party asking for room on another company's poles is itself charging that company a higher rent per cross-bar on its own poles heretofore erected, in which case an equal rental may be demanded for wires on poles erected under these rules." Another regulation of the St. Louis Board of Public Improvements, under the head of "Rules for the guidance of the Board," is as follows: "No permit shall be issued for more than one line of poles on any street, so long as the wires of the different parties can be accommodated by the poles on one line under the regulations above stated. No permit for a third line of poles shall be given, except in case both sides of the street are already occupied by poles, erected under former permits, owned by parties who refuse to comply with the above regulations; such parties not being entitled to the privilege of using the poles erected by companies which conform to these regulations."

§ 58. **Statutes Restraining Invasions of Private Property.**—Statutes have been found necessary in some of the States to restrain such companies from invading private premises with their wires and appendages. One of these in Ohio is as follows:

"No such company shall, without the consent of the owner thereof, in writing, enter a building or edifice, or use or appropriate any part thereof, or erect any telegraph pole, pier, or abutment in any yard or enclosure within which an edifice is situate, nor, in cases not provided for in section three thousand four hundred and sixty-one, erect any telegraph pole, pier, abutment, wires, or other fixtures, so near to any edifice as to occasion injury thereto, or risk of injury, in case such pole, pier, or abutment be overthrown, nor injure or destroy any fruit or ornamental trees."¹

¹ Rev. Stats. Ohio, § 3457.

Another statute of the same State is as follows :

"That any person engaged either for himself, or as an officer, clerk, agent, servant, or other employe of any corporation, firm, or person, doing business wholly or partly in the State of Ohio, as receivers and transmitters of messages or other communications, either by telegraph, telephone, or other similar means, or of any electric light, district telegraph, or other company, person, firm, or corporation, who shall enter into or upon the premises, building or buildings of another, for the purpose of constructing, altering, repairing, or examining the wires, poles, insulators, frames, or other appendages, belonging to such corporation, company, firm, or person, without the written consent of the owner or agent of such premises, building or buildings, or shall attach thereto any wire, pole, insulator, frame, or other appendage whatsoever, without such consent, shall be fined not less than ten or more than one hundred dollars."¹

A statute of Rhode Island is as follows :

"No person shall place any telegraph or telephone lines or poles, or any fixtures appertaining thereto, upon any private property, without the consent of the owners thereof."²

"No person shall labor upon the work of erecting, or repairing, any telegraph or telephone line, belonging to any telegraph or telephone company, without having conspicuously attached to his dress a medal or badge, on which shall be legibly inscribed the name of the owners thereof, by whom he is employed, and a number, by which he can be readily identified."³

"Every person who shall violate any of the provisions of the preceding two sections, shall be fined, not exceeding twenty dollars, or be imprisoned, not exceeding three months."⁴

A statute of Vermont is as follows :

"Every person, or corporation, maintaining, or operating a telephonic, telegraphic, or other electrical line, who cuts down, mutilates, or injures the trees standing upon the land of another, and anyone who, in any manner affixes, or causes to be affixed, to the property of another, any post, structure, fixture, wire, or other apparatus for telephonic, telegraphic or other electrical communica-

¹ Ohio Act of April 29, 1885; Laws 1885, p. 166, § 1.

² Gen. Stats. R. I. 1882, p. 680, § 48.

³ *Ibid.* § 49.

⁴ *Ibid.* § 50.

tion, without first having procured the right so to do, by application to and determination of the selectmen of the town, agreeably to chapter one hundred and sixty-three of the Revised Laws of Vermont, or first obtaining the consent of the owner, or lawful agent of the owner of such property, shall, on complaint of such owner, or his tenant, be punished by fine not exceeding one hundred dollars."¹

§ 59. **Statutes Authorizing the Use of Roads and Streets by Telegraph and Telephone Companies.**—Statutes exist in several of the States authorizing the use of public roads and streets by telegraph and telephone companies in the erection of their poles and the stringing of their wires. The following statute of Virginia may be given as an example :

"Every telegraph and every telephone company, incorporated by this or any other State, or by the United States, may construct, maintain, and operate its line along any of the State or county roads, or works, and over the waters of the State, and along and parallel to any of the railroads of the State, provided the ordinary use of such roads, works, railroads, and waters, be not thereby obstructed; and along, or over, the streets of any city, or town, with the consent of the council thereof."²

"Such company may contract with any person or corporation, the owner of lands, or of any interest, franchise, privilege, or easement therein, or in respect thereto, over which such line is proposed to be constructed, for the right of way, for erecting, repairing, and preserving its poles and other structures, necessary for operating its line, and the right of way, for the erection and occupation of offices, at suitable distances along its line, for public accommodation."³

"If the company and such owner cannot agree on the terms of such contract, the company shall be entitled to such right of way, upon making just compensation therefor to such owner. Such compensation shall be ascertained and made, as provided in chapter forty-six, for the acquisition of lands by a company incorporated for a work of internal improvement, when such internal improvement company cannot agree on the terms of the purchase

¹ Vt. Laws 1884, p. 102, § 1.

² Va. Code 1887, § 1287.

³ *Ibid.* § 1298.

with those entitled to the lands wanted for the purpose of the company. The title which may be acquired by a telegraph or telephone company, under this section, shall be only to a right of way for the purposes stated in the preceding section; and no right of way acquired by any such company, under this, or the preceding section, shall be to the exclusion of other like companies from having, or acquiring, a like right of way over the same lands.¹

"The three preceding sections shall be subject to repeal, alteration, or modification, and the rights and privileges acquired thereunder shall be subject to revocation or modification, by the General Assembly, at its pleasure."²

A statute of Connecticut in like manner enacts:

"Every telegraph or telephone company may maintain and construct lines of telegraph or telephone upon any highway, or across any waters in this State, by the maintenance and erection of the necessary fixtures, including posts, piers, or abutments for sustaining wires; but the same shall not be so constructed as to incommode the public travel or navigation, nor to injure any tree without the consent of the owner; nor shall such company construct any bridge across any waters; and said lines shall be personal property."³

"No telegraph, telephone, or electric light company or association, nor any company or association engaged in distributing electricity by wires or similar conductors, or in using an electric wire or conductor for any purpose, may hereafter exercise any powers which may have been conferred upon it to erect or place wires, conductors, fixtures, structures, or apparatus of any kind over, on, or under any highway or public ground, or to change the location of the same, without the consent of the adjoining proprietors, or in case such consent cannot be obtained, without the consent in writing of two of the county commissioners of the county in which it is desired to exercise such powers, which shall be given only after a hearing upon due notice to such proprietors; and the fees of such commissioners shall be paid by such company."⁴

A statute of the Territory of Dakota enacted as follows:

¹ Va. Code 1887, § 1289.

² *Ibid.* § 1290.

³ Gen. Stat. Conn. 1887, § 3944.

⁴ *Ibid.* § 3945.

"There is hereby granted to the owners of any telegraph or telephone lines operated in this Territory, the right of way over lands and real property in this Territory, and the right to use public grounds, streets, alleys, and highways in this Territory, subject to the control of the proper municipal authorities as to what grounds, streets, alleys, or highways said lines shall run over or across, and the place the poles to support the wires are located; the right of way over real property granted in this Act may be acquired in the same manner and by like proceedings, as provided for railroad corporations."¹

A statute of Illinois likewise enacts:

"It shall be lawful for any person or persons living on the line of any public highway, street or alley, outside of any incorporated city, village, or town in this State, or on any private road leading to such highway, street, or alley, to construct, operate and maintain a line, or lines, of telegraph or telephone extending from house to house, as the parties interested in the construction of such lines may desire."²

"For the purpose of constructing and maintaining such lines of telegraph or telephone, the parties in interest may set the necessary poles or posts on which to place the wires and insulators of such lines, in any of the public streets, highways, or alleys, or in any private road leading to such highways, streets, or alleys outside of the incorporated cities, villages, or towns in this State, along which such lines may pass; provided, such poles or posts shall be placed along the boundaries of such highways, streets, or alleys, at such distances therefrom as the authorities having control thereof may direct; and provided further, that the wires necessary for such lines shall not be less than fifteen feet above the ground along such boundaries, and not less than twenty feet at any public or private crossing, and shall be so placed as not in any manner to interfere with such crossing."³

"Any person who shall unlawfully and intentionally injure, molest, or destroy any of said lines, or the material or property belonging thereto, or shall in any manner interfere with the proper working of such lines, shall, on conviction thereof, be deemed guilty of a misdemeanor, and be punished by a fine not exceeding one hundred dollars; said fine to be recoverable in any court

¹ Comp. Laws Dakota Ter. 1887, § 3025.

² Rev. Stats. Ill. 6th ed., p. 1471, § 1.

³ *Ibid.* § 2.

having jurisdiction of the same ; provided, that prosecution under the foregoing provision of this section shall not, in any manner, prevent a recovery by the person or persons entitled thereto, of the amount of damages done to such lines."¹

A statute of Minnesota enacts as follows :

"Any number of persons, not less than five, may associate themselves and become incorporated, for the purpose of building, improving, and operating railways, telegraphs, pneumatic tube lines, sub-way conduits for the passage, operation and repair of electric and other lines or pipes, canals, or slack-water navigation, upon any river, bay or lake, and all works of internal improvement which require the taking of private property, or any easement therein. * * *"

The Revised Statutes of Missouri contain this provision :

"Companies organized under the provisions of this article for the purpose of constructing and maintaining telephone or magnetic telegraph lines, are authorized to set their poles, piers, abutments, wires and other fixtures, along and across any of the public roads, streets and waters of this State, in such a manner as not to incommode the public in the use of such roads, streets and waters : provided, any telegraph or telephone company desiring to place its wires and other fixtures under ground, in any city, they shall first obtain consent from said city through the municipal authorities thereof."²

A statute of Nebraska enacts as follows :

"That any telegraph or telephone company, incorporated or doing business in this State, shall be and is hereby granted the right of way along any of the public roads of this State for the erection of poles and wires ; provided that poles shall be set at least six

¹ Rev. Stat. Ill. (6th ed.) p. 1471, § 3.

² 2 Gen. Stats. Minn. p. 304, § 1, as amended by Act of 1875, ch. 14, § 1; 1885, ch. 18; 1887, ch. 161. The legislature of Mississippi passed "An Act to encourage and facilitate the construction of telegraph, telephone and other like lines," in 1886 (Miss. Laws 1886, p. 93), in eleven sections which provide for the condemnation of the right of way by such companies.

³ Mo. Rev. Stats. 1879, § 879; as amended, *Id.* 1889, § 2721. See *State v. Flad*, 23 Mo. App. 185; *Hannibal v. Missouri, etc. Tel. Co.*, 31 Mo. App. 29.

feet within the boundary line of said roadway, and not placed so as to interfere with road crossings."¹

A statute of New Hampshire contains these provisions :

"The proprietors of any telegraph line, or of any telephone exchange, or line of telephones used for the transmission of spoken messages, by means of the electric speaking telephone, or of lines for establishing electric lights in this State, may erect and maintain the necessary poles and structures, and stretch the necessary wires for the use of such telegraph line or telephone exchange, or line of telephones, or line for electric lighting, over, across, and along any public highway in this State, or may lay the same under the surface of any such highway."²

"Such telegraph, telephone, or electric lighting poles, structures and wires shall be erected and maintained subject to the provisions of chapter 80 of the General Laws of this State relating to telegraphs, which are hereby made applicable to lines of wire for telephonic and electric lighting purposes ; and no poles, structures or wires are hereby authorized that shall in any way impede or obstruct the free and safe use of any highway for public travel, nor that shall interfere with or obstruct the safe, free, and convenient use of or access to or from, any lands or buildings adjoining or near such highway ; and no such poles or other structures shall be erected, or wires stretched, by any of such proprietors, on, over, or across the lands or buildings of any individuals, or corporations, without their consent ; and no right shall be acquired by the use of wires stretched on, over, or across the lands or buildings of any such individual or corporation, for any length of time."³

A statute of Louisiana is as follows :

"Corporations chartered or formed, under the laws of this or of any other State, or under the laws of the United States, for the purpose of transmitting intelligence by magnetic telegraph or telephone, or other system of transmitting intelligence, the equivalent thereof which may be hereafter invented or discovered, may construct [and] maintain such telegraph, telephone, or other lines

¹ Neb. Laws 1887, p. 634, § 1.

² N. H. Laws 1881, ch. 54, p. 472, § 1.

³ *Ibid.* § 2. Section 13 of the same statute declares: "The use of the highways of this State by telegraph, telephone and electric lighting poles, structures and wires, under and in accordance with the provisions of this act, is hereby declared to be a *public use* of such highways."

necessary to transmit intelligence along all State, parish, or public roads or public works, and along and parallel to any of the railroads in the State, and along and over the waters of this State; provided, that the ordinary use of such roads, works, railroads and waters be not thereby obstructed; and along the streets of any city, with the consent of the council or trustees thereof; and such companies shall be entitled to the right of way over all lands belonging to the State, and over the lands, privileges and servitudes of other persons and corporations, and the right to erect poles, piers, abutments and other works necessary for constructing, working, operating and maintaining their lines and works, upon making just compensation therefor. That in the event such company shall fail, on application therefor, to secure such right by consent, contract or agreement upon just and reasonable terms, then such companies or corporations, shall have the right to proceed to expropriate the same, as provided in and by the laws of the State relative to expropriation of lands for railroads and other works of public utility; and shall so construct their works as not to impede or obstruct the full use of the highways, navigable waters, or the drainage or natural servitudes of the land over which the right of way may be exercised. But no company operating under the provisions of this act shall have the power to contract with the owners of land or with any other corporation, for the right to erect and maintain any telephone, telegraph or other line for the speedy transmission of intelligence over his or its lands, privileges or servitudes, to the exclusion of the lines of other companies operating under the provisions of this act."¹

The Revised Statutes of Ohio contain elaborate provisions on the subject of telegraph companies. One of them is as follows:

"A magnetic telegraph company, heretofore or hereafter created, may construct telegraph lines, from point to point, along and upon any public road, by the erection of the necessary fixtures, including posts, piers and abutments necessary for the wires; but the same shall not incommode the public in the use of such roads."²

¹ La. Rev. Stats. as amended by Act of April 10, 1880 (Laws 1880, p. 168).

² Rev. Stats. Ohio, § 3454.

CHAPTER IV.

NEGLIGENT INJURIES BY AND TO THESE COMPANIES.

Article I. GENERAL VIEWS.

Article II. INJURIES IN THE USE OF STREETS AND HIGHWAYS.

Article III. INJURIES TO THEIR OWN EMPLOYEES.

ARTICLE I.—GENERAL VIEWS.

SECTION.

63. General Views of the Liability of Private Corporations Owning Public Works.
64. Theories on which Electrical Companies Liable for Negligence.
65. Whether a Quasi Insurer: Collecting Dangerous Agencies on One's Own Land.
66. Reasonable Care is Proportionate to Danger of Mischief.
67. How Far Liability Rests on the Principle of Trespass.
68. Under the Civil Code of Louisiana.
69. Non-Liability of Postmaster-General Operating Postal Telegraph.

§ 63. **General Views of the Liability of Private Corporations Owning Public Works.**—The writer has endeavored to give in his work on Negligence a general view of the liability of private corporations owning public works, in actions for civil damages on the grounds of negligence and nuisance, showing especially the nature and extent of their liability for failing to repair the public streets and highways which they have broken,¹ and for injuries

¹ 1 Thomp. Neg. pp. 555-567.

'to land-owners' through negligence in the performance of *ultra vires* or gratuitous acts,' etc. It may be useful in this place to recur to the general principle which has been already briefly alluded to,¹ and which is liable to come into constant application in cases where the action is by the owners or occupiers of land for damages on the theory of negligence or nuisance. That principle is that such companies are not liable for the careful and proper exercise of their statutory powers.⁴ This principle

¹ 1 Thomp. Neg. p. 567.

² *Id.* p. 573.

³ *Ante*, § 28.

⁴ The following cases may be referred to as illustrating this principle: British Cast-Plate Manufacturers v. Meredith, 4 Term Rep. 794; Schuylkill Nav. Co. v. McDonough, 33 Pa. St. 73; Bordentown, etc. Turnpike Co. v. Camden, etc. R. Co., 17 N. J. L. 314; Hatch v. Vermont, etc. R. Co., 25 Vt. 49; Sutton v. Clark, 8 Taunt. 29; Boulton v. Crowther, 2 Barn. & Cress. 703; Pollock, C. B., in Whitehouse v. Birmingham Canal Co., 25 L. J. (Exch.) 27; Henry v. Pittsburg, etc. Bridge Co., 8 Watts & S. (Pa.) 58; Shrunk v. Schuylkill Nav. Co., 14 Serg. & R. (Pa.) 71; Commonwealth v. Fisher, 1 Pa. 467; Monongahela Nav. Co. v. Coons, 6 Watts & S. (Pa.) 101; Susquehanna Canal Co. v. Wright, 9 Watts & S. (Pa.) 9; Lansing v. Smith, 8 Cow. (N. Y.) 146; Cleveland, etc. R. Co. v. Speer, 56 Pa. St. 325, 334; Stowell v. Flagg, 11 Mass. 364; Stevens v. Middlesex Canal Co., 12 Mass. 466; Piscataqua Bridge v. New Hampshire Bridge, 7 N. H. 35; Hollister v. Union Co., 9 Conn. 436; Burroughs v. Housatonic R. Co., 15 Conn. 124. In the leading case of Mersey Docks Trustees v. Gibbs, in the House of Lords, L. R. 1 H. L. 93, 112, Mr. Justice Blackburn, in giving the opinion of the judges, said: "If the legislature directs or authorizes the doing of a particular thing, the doing of it cannot be wrongful; if damage results from the doing of that thing, it is just and proper that compensation should be made for it, and that is generally provided for in the statutes authorizing the doing of such things. But no action lies for what is *damnum sine injuria*; the remedy is to apply for compensation under the provision of the statutes legalizing what would otherwise be a wrong. This, however, is the case, whether the thing is authorized for a public purpose or a private profit. No action will lie against a railway company for erecting a line of railway authorized by its acts, so long as the directors pursue the authority given them, any more than it would lie against the trustees of a turnpike road for making their road under their acts, though the one road is

is understood to exist in the English law without qualification; but in the American law, it always assumes that the statute itself is within the constitutional powers of the legislature; for, while in England there are no constitutional restraints upon the Parliament, yet in America both the acts of the State legislatures and of the Congress of the United States are liable to be declared void by the judicial courts as being opposed to constitutional inhibitions. But the English courts proceed upon the view that the statutory powers granted to such companies are granted subject to the implication that they will exercise them in the proper manner, by the proper process, without negligence, and so as not to cause unnecessary damage to others.¹ In America, it has been said to be "well settled that an injury to private property resulting from an act authorized by law, and done in pursuance of the statute, cannot be justified unless the act were done by one acting as agent or in behalf of government, or to effect a public interest; and the statute

made for the profit of the shareholders in the company, and the other is not. The principle is, that the act is not wrongful, not because it is for a public purpose, but because it is authorized by the legislature."

¹ See in general illustrations of this proposition the following English cases: *Gas-Light, etc. Co. v. St. Mary Abbot's*, 15 Q. B. Div. 1; *Biscoe v. Great Eastern Railway Co.*, L. R. 16 Eq. 636; *Brine v. Great Western Railway Co.*, 31 L. J. (Q. B.) 101; *Lawson v. Great Western Railway Co.*, 16 Q. B. 643; *Clethier v. Webster*, 30 L. J. (C. P.) 306; *Chamberlain v. Chester, etc. Railway Co.*, 1 Exch. 180; *Broadbent v. Imperial Gas-Light Co.*, 20 L. J. (Ch.) 280; *Scott v. Manchester (Mayor, etc.)*, 1 H. & N. 59; s. c., 2 H. & N. 204; *Nicholls v. Marsland*, 2 Ex. D. 1; *Burgess v. Northwich Local Board*, L. R. 6 Q. B. D. 264; s. c., 50 L. J. (Q. B.) 219; *Knock v. Metropolitan Railway Co.*, L. R. 4 C. P. 131; *Geddis v. Bann Reservoir (Proprietors)*, 3 App. Cas. 430; *Saddler v. Staffordshire, etc. Co.*, 58 L. J. (Q. B.) 421. Under the English theory any works not necessary to the doing of what the statute authorizes are unprotected and may give rise to right of action for injuries ensuing from them. *Hornby v. Liverpool United Gas Co.*, 47 J. P. 23.

is no bar to an action for damages resulting from such act, unless it provides a different mode of compensation.'"¹ It is further limited so far that, in many cases where the legislature authorizes the doing of an act by an individual or a corporation, for his or its private gain or benefit, without providing for the assessment or payment of possible damages which may thereby result to individuals, the courts will not infer that the legislature intended that the citizen should be damnified, even for the public benefit, without redress, but will imply an obligation on the part of the person or corporation for whose benefit the injury has been done, to pay such damages. The grantee is deemed to accept such a grant subject to the maxim *sic utere tuo ut alienum non lœdas*.² One court has gone farther, and has declared—the Constitution of the State being silent upon the question, and the court understanding the Fifth Amendment to the Federal Constitution to be restricted to the United

¹ Delaware, etc. Canal Co. v. Lee, 22 N. J. L. 247 (qualifying the language of Nevius, J., in Van Schoick v. Delaware, etc. Canal Co., 20 N. J. L. 249). This view of the law is supported by Sinnickson v. Johnson, 17 N. J. L. 129, Dayton and Nevius, JJ., giving forcible opinions. Compare Rogers v. Bradshaw, 20 Johns. (N. Y.) 735; Stevens v. Middlesex Canal Co., 12 Mass. 486; Shrunk v. Schuylkill Nav. Co., 14 Serg. & R. (Pa.) 71; Commonwealth v. Fisher, 1 Pa. St. 467.

² Crittenden v. Wilson, 5 Cow. (N. Y.) 165, per Sutherland, J.; Hooker v. New Haven, etc. R. Co., 14 Conn. 147; Baltimore, etc. R. Co. v. Reaney, 42 Md. 117; Delaware, etc. Canal Co. v. Lee, 22 N. J. L. 243; Gardner v. Newburgh, 2 Johns. Ch. (N. Y.) 162; Sinnickson v. Johnson, 17 N. J. L. 129; 1 Thomp. Neg. pp. 105, 278, 279. *Contra*: Dodd v. Williams, 3 Mo. App. 278. Thus, a statute authorized John Denn to build a dam across a navigable creek, for his own private advantage. This protected him against an indictment for obstructing the navigation, but not against an action for damages for flowing the lands of an adjacent owner. He proceeded to execute the power conferred upon him by the statute, at the peril of paying the damages he might thereby cause to others. Sinnickson v. Johnson, *supra*.

States merely,—that the government cannot damnify private persons, even for the public benefit, without making compensation.¹ So, where a canal company's act, after providing for the purchase by the company of subjacent mines, on notice by the owner of an intention to work them, contained a clause reserving to the owner the right to work the mines, "provided that in working such mines no injury be done to the said navigation,"—this was held to mean no unnecessary injury, that is, no injury except such as might arise from a failure to work the mines in the usual and customary manner.²

§ 64. **Theories on which Electrical Companies Liable for Negligence.**—These companies are liable for injuries to strangers—the latter being without fault—in consequence of defects in their apparatus which are the result of negligence or unskillfulness, or of the negligence or unskillfulness of their agents or servants in using the same. The principles upon which this liability rests cannot be gone into at length in a special work like this. Generally speak-

¹ *Ten Eyck v. Delaware, etc. Canal Co.*, 18 N. J. L. 200. In *Sinnickson v. Johnson*, 17 N. J. L. 146, *Dayton, J.*, declared the Fifth Amendment to the Federal Constitution, though not binding on the States (*Barron v. Baltimore*, 7 Pet. (U. S.) 243; *Livingston v. Moore*, 7 Pet. (U. S.) 551), "operative as a principle of universal law." The same view of the subject was taken by the Supreme Court of North Carolina, in the absence of a similar constitutional provision. *Raleigh, etc. R. Co. v. Davis*, 2 Dev. & B. (N. C.) 451. Under like circumstances the Supreme Court of South Carolina, by a divided court, ruled that compensation was not indispensable. *State v. Dawson*, 3 Hill (S. C.), 100. In a leading case in Vermont (*Hatch v. Vermont, etc. R. Co.*, 25 Vt. 49), *Redfield, J.*, expressed the view that the decision of the minority of the South Carolina court, as expressed by *Richardson, J.*, is the better view.

² *Dudley Canal Nav. Co. v. Grazebrook*, 1 Barn. & Adol. 59. An elaborate exposition of a similar statute will be found in *Dunn v. Birmingham Canal Co.*, L. R. 8 Q. B. 42; s. c., 21 Week. Rep. 266; 27 L. T. (N. S.) 683; 42 L. J. (Q. B.) 34.

ing, every one is under a social obligation to use ordinary or reasonable care to avoid injuring others. From the nature of the case, the law can furnish no exact standard by which to measure this degree of care. It is the care which a prudent and reasonable man, mindful of his social obligations, would exercise under the same circumstances; and whether this degree of care has been exercised is ordinarily to be determined by the judgment of twelve men in the jury box; though where the facts are not in dispute, and the inferences to be drawn from them are unequivocal, it may be determined by the judge as a question of law. He may, and often does, properly say that there is no evidence of negligence, and nonsuit the plaintiff. He may also say that an unavoidable inference of contributory negligence arises out of the plaintiff's own evidence, and nonsuit him on that ground. But where there is what the books term "evidence of negligence," the jury must ordinarily be left to say whether it is sufficient to entitle the plaintiff to recover damages, and, if so, what damages.

§ 65. **Whether a Quasi Insurer: Collecting Dangerous Agencies on One's Own Land.**—It may be doubted whether persons or corporations employing for their own private advantage so dangerous an agency as electricity, ought not to be regarded as *quasi* insurers, as toward third persons, against any injurious consequences which may flow from it. It may be doubted whether one who collects, or rather *creates*, so dangerous an agency on his own land, ought not to be held to the obligation of restraining it, that is, of insulating it, at his peril; which was the obligation put upon land-owners in

respect of water, which from its nature is pressing outward in all directions and continually struggling to break through any artificial barriers by which it may be restrained. That principle was thus laid down by Mr. Justice Blackburn, in giving the judgment of the court of Exchequer Chamber in the celebrated case of *Fletcher v. Rylands*, affirmed by the House of Lords *in ipsissimis verbis*: "We think that the true rule of law is, that the person who, for his own purposes, brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril; and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default; or perhaps that the escape was the consequence of *vis major*, or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule as above stated seems, on principle, just. The person whose grass or corn is eaten down by the escaping cattle of his neighbor, or whose mine is flooded by the water from his neighbor's reservoir, or whose cellar is invaded by the filth from his neighbor's privy, or whose habitation is made unhealthy by the fumes and noisome vapors of his neighbor's alkali works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbor who has brought something on his own property (which was not naturally there), harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbor's, should be obliged to make good the

damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued; and it seems but just that he should, at his peril, keep it there so that no mischief may accrue, or answer for the natural and anticipated consequences. And upon authority, this, we think, is established to be the law, whether the things so brought be beasts, or water, or filth, or stenchess.'"

§ 66. **Reasonable Care is Proportionate to Danger of Mischief.**—The doctrine of the case cited in the preceding section has not met with approval in all American jurisdictions; but many American courts are rather disposed to place the liability on the land-owner who collects dangerous substances on his land and allows them to escape to the damage of others, on the principle of negligence, and to make his liability turn on the decision of the question whether he exercised reasonable care to avoid the catastrophe.* But even under this rule the same measure of practical justice will generally be secured, because all courts agree that what is termed reasonable care is a degree of care, watchfulness, skill and attention proportionate to the danger.*

§ 67. **How far Liability Rests on the Principle of Trespass.**—Where the injury is to the *property* of another, the conceptions of the early common law, as found in the case of *Fletcher v. Rylands*,¹ un-

¹ *Fletcher v. Rylands*, L. R. 1 Exch. 265 (reversing s. c., 3 Hurl. & Colt. 744); affirmed in H. L. *sub. nom.* *Rylands v. Fletcher*, L. R. 3 H. L. 330; reported in full in 1 Thomp. Neg. 1.

* 1 Thomp. Neg. 101, *et seq.*

* *Lynch v. Nurdin*, 1 Ad. & El. (N. S.) 36, per Lord Denman, C. J.; s. c., 2 Thomp. Neg. 1140; *Northern Central R. Co. v. Price*, 29 Md. 420; *Morgan v. Cox*, 22 Mo. 373; s. c., 1 Thomp. Neg. 238.

⁴ 3 Hurl. & Colt. 774; L. R. 1 Exch. 265; in House of Lords, *sub. nom.*, *Rylands v. Fletcher*, L. R. 3 H. L. 330.

doubtedly proceed on the ground of *trespass*;¹ and if we go back to the analogy of the celebrated *Squib Case*,² the same is true where the injury is a direct injury to the *person* in the nature of an assault. Conceptions still exist in the American books of the law, which make a man liable for the consequences of a direct invasion of another's premises by something which he is doing on his own land, in itself inherently dangerous, irrespective of negligence. This view has been taken where the plaintiff's premises were invaded by stones thrown from the defendant's quarry in blasting rocks;³ but in the same and other jurisdictions, the application of this doctrine has been denied in the case of injuries caused by the explosion of steam boilers. Thus it has been held that one who erects on his own premises a steam boiler having in it no defect known to him, or which he might have discovered by the exercise of ordinary care and skill, that is to say, by the application of known tests, and who operates it with care and skill, is not answerable to an adjacent proprietor for damages caused by its explosion.⁴ The rule of the ancient common law which rested the liability on the ground of trespass proceeded on a view which was characteristic of that law, of the sacred nature of the rights of property. A man's house was his castle, and his

¹ 3 Wils. 403; s. c., 2 W. Black. 892.

² *Scott v. Shepherd*, 2 W. Black. 892; s. c., 3 Wilson, 403.

³ *Hay v. Cohoes Co.*, 2 N. Y. 159 (affirming s. c., 3 Barb. 42); s. c., 1 Thomp. Neg. 72; *Tremaine v. Cohoes Co.*, 2 N. Y. 163; s. c., 1 Thomp. Neg. 76; *Scott v. Bay*, 3 Md. 431.

⁴ *Losee v. Buchanan*, 51 N. Y. 476, affirming s. c., 42 How. Pr. (N. Y.) 385; reversing s. c., 61 Barb. (N. Y.) 86; 1 Thomp. Neg. 47. See also *Marshall v. Wellwood*, 38 N. J. L. 339, where the same conclusion was reached on similar facts. See 1 Thomp. Neg. 112.

field was his battle ground. Neither could be invaded by another with impunity. If a fire broke out by misfortune in one man's house and spread to his neighbors, he was bound to make good the loss;¹ and if his cattle escaped upon the land of another and there did damage, he was liable without proof of negligence.² The rule of the modern law, which rests the liability on the failure to exercise reasonable or ordinary care, proceeds on conceptions more suitable to the state of populous and crowded communities. It is that men dwelling near to each other ought not to stand as insurers against every possible injury that may proceed from one's premises to that of his neighbor; that such a liability puts too great a burden upon the shoulders of every one, and charges him with responsibility for accidents where he has been guilty of no failure of social duty to his neighbor. Which of these two principles is the more conducive to justice leaves open a wide field for casuistry.

§ 68. *Under the Civil Code of Louisiana.*—The Civil Code of Louisiana (Art. 2316) provides that one shall be liable for damages occasioned by his negligence, imprudence or want of skill. This may be accepted as stating the rule of the com-

¹ *Filliter v. Phippard*, 11 Q. B. 347; *Beaulieu v. Finglam*, Yearb. 2 Hen. IV., fol. 18, pl. 16; *Rolle Abr. Action sur. Case*, B. tit. Fire.

² *Mason v. Keeling*, 12 Mod. 335; s. c., 1 Ld. Raym. 606; *Rex v. Huggins*, 2 Ld. Raym. 1583; *Dyer*, 25, pl. 162; 20 Vin. Abr. tit. "Trespass," B, 424; *Millen v. Fandrye*, Poph. 161; *Jones on-Bail*, 131; *Jenkins v. Turner*, 2 Salk. 662; *Decker v. Gammon*, 44 Me. 322; *Goodman v. Gay*, 15 Pa. St. 188; *Dickson v. McCoy*, 39 N. Y. 401; *Studwell v. Ritch*, 14 Conn. 292; *Com. Dig. tit. "Droit," M, 2*; 3 Black. Com. 211; *Williams v. New Albany R. Co.*, 5 Ind. 111; *Lafayette, etc. R. Co. v. Shriner*, 6 Ind. 141; *Page v. Hollingsworth*, 7 Ind. 317; *Beckett v. Beckett*, 48 Mo. 396; *Dolph v. Ferris*, 7 Watts. & S. 367; *Lyke v. Van Leuven*, 4 Denio (N. Y.), 127; s. c., 1 N. Y. 515; *Barnum v. Vandusen*, 16 Conn. 200; *Lee v. Riley*, 34 L. J. (C. P.) 212.

mon, as well as of the civil law. The same code (Art. 2317) imposes a liability for damages caused by things in one's custody. This may be regarded as imposing a liability somewhat analogous to that laid down in the celebrated case of *Fletcher v. Rylands*.¹ With this statute in force, a police officer on duty at a bank was injured by the explosion of apparatus used in lighting the building by electricity. The proximate cause of the injury appeared to be the insufficiency of the fuse-catchers, either in number or in capacity, to break the current when it should become too strong. It was held that he might maintain an action against the electric light company.²

§ 69. **Non-Liability of Postmaster-General Operating Postal Telegraph.**—Should any portion of the telegraph service pass into the hands of the Post-Office department, the question may arise as to the liability of the Postmaster-General for negligence resulting in damages to private persons. Such actions have been more than once attempted against the Postmaster-General in Great Britain, but without success;³ and the same immunity has been

¹ *Ante*, § 65.

² *Yates v. Southwestern Brush, etc. Co.*, 40 La. An. 467; s. c., 4 South. Rep. 250. In this action it appeared that an officer of defendant, the B. Co., had purchased the right to use a patent for incandescent lighting. Soon after the S. Co. was organized, all the officers and directors except the president being the same as those of the B. Co. The officers of the bank where the explosion occurred testified that their contract was with the B. Co., which was notified of the accident and repaired the damage, which also made out, collected and receipted all bills. The S. Co. appeared to have kept no independent books, and a system for whose use it had contracted was operated by the B. Co. without any purchase: *Held*, that the S. Co. was merely an auxiliary of the B. Co., and the action was properly brought against the latter. *Ibid*.

³ *Lane v. Cotton*, 1 Ld. Raym. 646; *Whitfield v. Le Despencer*, Cowp. 754; *Jones v. Monsell*, 6 Ir. (C. L.) 155.

extended in this country to a deputy Postmaster-General, or local postmaster, and his assistants duly appointed and qualified.¹ These decisions proceed on the ground that the officers in question were acting *for the State*, and not as individuals, and that they were not performing services for particular persons distributively, as a sheriff in executing process, or a recorder in recording a deed. But there is no sense whatever in the attempted distinction which exonerates one and holds the other liable. There is absolutely no sense in the distinction which makes the postal agent who transports and delivers your letters, thereby acting as a common carrier for your benefit individually, and the sheriff who, at your request, levies an attachment, or the recorder who, at your request, records a deed. The real distinction will have to be sought on better grounds than the reasoning of the courts. By a certain British statute,² the term "the company" in the Telegraph Act, 1863, shall, "in addition to the meaning assigned to it in that act, mean the Postmaster-General." In an action against the Postmaster-General, in his individual capacity, for negligently opening a flagway by his servants for the purpose of erecting telegraph posts, it was held that the action did not lie.³

¹ Schroyer v. Lynch, 8 Watts (Pa.), 453; Wiggins v. Hathaway, 6 Barb. (N. Y.) 632; Dunlop v. Munroe, 7 Cranch (U. S.), 742; Bolan v. Williamson, 1 Brev. (S. C.) 181.

² Telegraph Act 1868 (31 & 32 Vict. ch. 110), which incorporates the Telegraph Act, 1863, 26 & 27 Vict. ch. 112, § 2.

³ Jones v. Monsell, 6 Ir. (C. L.) 155.

ARTICLE II.—INJURIES IN THE USE OF STREETS, HIGHWAYS AND NAVIGATIONS.

SECTION.

70. General Proposition in Regard to Liability for Negligence in the Use of the Streets.
71. License from the City no Defense.
72. Proximate and Remote Cause.
73. Contributory Negligence of the Traveler.
74. Contributory Negligence of Driver Not Imputable to the Passenger.
75. Poles Erected in Part of the Street Prohibited to Travel.
76. Injuries From Improper Location of Poles.
77. Collision in Consequence of Horse Running Away.
78. Injuries From Overhanging Wires.
79. Injuries From Guy Wires.
80. Poles Blown down by Storms.
81. Right of Contribution by Municipal Corporation against Electric Light Company.
82. Obstructing Navigation.
83. Vessels Injuring Submarine Cables.
84. Electric Trains Frightening Horses.
85. Certain Evidential Matters.

§ 70. **General Proposition in Regard to Liability for Negligence in the Use of the Streets.**—If a telegraph, telephone or electric light company so erects its poles or suspends its wires as to make the highway dangerous to ordinary travel, and if a traveler proceeding with ordinary care, comes in contact with its poles or wires, so erected or suspended, and thereby sustains injury, he, or any other person

having a right of action for such injury, may recover the resulting damages of the company.¹

§ 71. **License from the City no Defense.**—We have already seen that municipal corporations hold their streets as a trust for the benefit of the public; that they are under a legal obligation to keep them in repair; and that they are indictable at common law and liable to an action for damages for negligently failing so to do. As they are thus under an affirmative duty toward the public of using care to keep their streets safe for the ordinary purposes of travel, it follows that they can not license a nuisance in them, and that the author of such a nuisance cannot justify under such a license. Accordingly, in an action for damages for injuries occasioned by the collision of plaintiff's buggy with a telephone pole erected by the defendant so as to dangerously obstruct the street, the license of the city is no defense.²

§ 72. **Proximate and Remote Cause.**—But although such a company may set its poles or suspend its wires in such a location or in such a manner as to become liable to an indictment for a public nuisance, it would not follow that it would be an insurer of private persons against remote consequences of such negligence. The rule *causa proxima, non remota spectatur* applies here, as in other actions for damages. It has accordingly been held, in a case where the plaintiff was injured through the falling of defendant's pole which was broken by

¹ *Pennsylvania Tel. Co. v. Varnau* (Pa.), 15 Atl. Rep. 624; *Wolfe v. Erie Tel., etc. Co.*, 33 Fed. Rep. 320; *Western Union Tel. Co. v. Eyser*, 2 Col. 141; *Thomas v. Western Union Tel. Co.*, 100 Mass. 156; *Wilson v. Great Southern Tel. Co.*, 41 La. An. 1041; s. c., 6 South. Rep. 781; *Dickey v. Maine Tel. Co.*, 46 Me. 483.

² *Wolfe v. Erie Tel., etc. Co.*, 33 Fed. Rep. 320.

the collision of a runaway team of horses, that, as the pole stood at such a distance from the traveled portion of the highway as to be safe from collisions with teams under ordinary circumstances, there could be no recovery, although the pole was not strong enough to withstand such a collision: the accident of the running away of the horses, and not the weakness of the pole, was deemed the proximate cause of the damage.¹

§ 73. **Contributory Negligence of the Traveler.**—The rule stated in the preceding section operates to exonerate the company where the proximate cause of the accident was the negligence of the traveler, and not that of the company in the erection of its poles or wires. The well-known *general rule* here is—subject to some exceptions in some American jurisdictions—that if the negligence of the traveler materially contributes to the injury he cannot recover, since the law has no scales by which it can separate and weigh the relative fault of the parties and say how much of the damage was due to the fault of each. The rule, in its application to injuries sustained by travelers through coming in contact with obstructions in the highway is—stated in a leading case in its simplest form—that the traveler cannot recover damages if he could have avoided the accident by the exercise of reasonable care on his part.² One who recklessly thrusts himself upon a known danger is guilty of contributory negligence.³ So, one who deliberately drives his

¹ *Allen v. Atlantic, etc. Tel. Co.*, 21 Hun (N. Y.), 22.

² *Butterfield v. Forrester*, 11 East, 60; s. c., 2 Thomp. Neg. 1104. For a discussion of the doctrine of contributory negligence in its application to injuries upon the highway, see 2 Thomp. Neg. 1197, *et seq.*

³ *Butterfield v. Forrester*, *supra*.

horse into a place of danger near an electric railroad track, with a full knowledge of the situation and danger, for the express purpose of testing the horse as to his disposition to become frightened, is guilty of such contributory negligence as will prevent a recovery, where the horse becomes frightened at a train and runs away.¹ The true inquiry here is whether, under all the circumstances of the case, the plaintiff or other person injured exercised ordinary or reasonable care—the two expressions being in a legal sense synonymous. Where the court charged the jury that if the position of the person killed by coming into collision with the wires of the defendant, was dangerous, owing to defendant's negligence alone, and he exercised the care of a prudent man, that was all that was required; that where one in such position, not having time to judge the best way of doing, selects a method not the best, the law would not impute negligence as readily as if he had time to choose; that another might have done differently, but the only question was what did care and prudence require, and did he do it,—it was held that the instruction was correct.² It has been held that the failure of a traveler to notice in the daytime an electric light wire on the sidewalk, over which she stumbled and fell, is

¹ *Cornell v. Detroit, etc. R. Co.* (Mich.), 46 N. W. Rep. 791.

² *Pennsylvania Tel. Co. v. Varnau* (Pa.), 15 Atl. Rep. 624. One can hardly understand the conception of the late territorial court of Colorado that the plaintiff's right to recover is not affected by his having contributed to his injury, unless he was in fault in so doing (*Western Union Tel. Co. v. Eyser*, 2 Col. T. 141); since contributory negligence is in itself fault. In a charge to the jury on the subject of the right of recovery for an injury sustained through the improper location of telephone poles in the public street with especial reference to the contributory negligence of the driver of the vehicle, see *Sheffield v. Central Union Tel. Co.*, 36 Fed. Rep. 164.

not contributory negligence as a matter of law, and will not prevent her from recovering for the injuries from the company. The court, speaking through Mr. Justice Berkshire, say: "A small wire lying along a sidewalk might very reasonably be overlooked by a passer-by who has no notice thereof, and the fact that it is overlooked does not necessarily indicate negligence. We cannot hold, as a question of law, that a person may not pass along a sidewalk cautiously and fail to observe a small wire lying along or across it; and then we can imagine many circumstances whereby the attention of the pedestrian might be attracted from the sidewalk which would be sufficient to divert the attention of any reasonably prudent person."¹

§ 74. **Contributory Negligence of Driver not Imputable to the Passenger.**—The doctrine obtained for a time in England, and to some extent in this country, under which, where one person having, roughly speaking, the custody of the person of another, was guilty of contributory negligence whereby that other was injured, the negligence of the custodian was imputed to the person injured, and he was debarred from recovering damages, notwithstanding the negligence of the defendant;² but this doctrine never met with full judicial and professional approval, and has now been thoroughly

¹ *Brush Electric Lighting Co. v. Kelley (Ind.)*, 9 Rail. & Corp. L. J. 135; s. c., 25 N. E. Rep. 812. The court cite: *Barry v. Terkiltsen*, 72 Cal. 254; *Hussey v. Ryan*, 84 Md. 426; *Jennings v. Van Schalck*, 108 N. Y. 530; *Kelly v. Blackstone*, 147 Mass. 448; *Noblesville, etc. Gas Co. v. Lehr*, 124 Ind. 79. The conclusion of the court is also supported by *Woods v. Boston*, 121 Mass. 337. See also 2-Thomp. Neg. 1197.

² *Thorogood v. Bryan*, 8 C. B. 114, 129; s. c., *Thomp. Carr.* 273; followed in *Armstrong v. Lancashire, etc. R. Co.*, L. R. 10 Exch. 47.

overthrown, both in England and America.¹ Accordingly, it has been held, in an action where a married woman was injured by the fact that the buggy in which she was riding and in which her husband was driving came in contact with one of the defendant's telegraph poles planted in the street, that if the injury was occasioned solely by the driver's negligence, the defendant was not liable; but that if the driver's negligence only contributed to the injury, his negligence could not be imputed to plaintiff, so as to defeat her action, where defendant's negligence also directly contributed to it.²

§ 75. **Poles Erected in Part of the Street Prohibited to Travel.**—The Supreme Court of Louisiana has recently held that the erection of wires by a telephone and telegraph company along neutral ground in a street, in such a manner as to endanger occupants of vehicles, is negligence, although a city ordinance prohibits the use of such ground for vehicles.³ But this decision seems to be unsound. The careless doing of an act which is forbidden by a valid statute or municipal ordinance is negligence *per se*;⁴ a traveler is, therefore, in such a case guilty

¹ *Bennett v. New Jersey, etc. R. Co.*, 36 N. J. L. 225; *Hay v. LeNeve*, 2 Shaw Sc. App. 405; *The Millam*, 1 Lush. 388, 403; *Waite v. Northeastern R. Co.*, El. Bl. & El. 728; *Greenland v. Chaplin*, 5 Exch. 243; *Little v. Hackett*, 116 U. S. 366; *New York, etc. R. Co. v. Steinbrenner*, 47 N. J. L. 161; *Chapman v. New Haven R. Co.*, 19 N. Y. 341; *Dyer v. Erie R. Co.*, 71 N. Y. 228; *Transfer Co. v. Kelly*, 36 Ohio St. 86; *Wabash, etc. R. Co. v. Shacklet*, 105 Ill. 364; *Danville, etc. Turnp. Co. v. Stewart*, 2 Met. (Ky.) 119; *Louisville, etc. R. Co. v. Case*, 9 Bush (Ky.), 728; *Cuddy v. Horn*, 46 Mich. 596.

² *Sheffield v. Central Union Tel. Co.*, 36 Fed. Rep. 164.

³ *Wilson v. Great Southern Tel., etc. Co.*, 41 La. An. 1041; s. c., 6 South. Rep. 781.

⁴ *Worster v. Proprietors*, 16 Pick. (Mass.) 541; *Heard v. Hall*, *Id.* 457; *Karle v. Kansas City, etc. R. Co.*, 55 Mo. 476; *Correll v. Burlington, etc. R. Co.*, 38 Iowa, 120; *Jetter v. New York, etc. R. Co.*, 2 Keyes (N. Y.), 154.

of negligence as matter of law. It is not perceived upon what ground he can properly make his own negligence, or possibly his own wilful fault in driving where the law prohibits him from driving, the ground of an action for damages.

§ 76. **Injuries from Improper Location of Poles.**—It has been held under the statutes of Ohio, but the principle is no doubt of general application, that a telephone company must exercise reasonable care in the location of its poles so as not to incommode public travel, but need not so locate them as to provide against all possible injuries under extraordinary circumstances.¹ Nor can such a company justify, under a license from the city, the location of a pole in such a place in the street, as makes it dangerous to public travel; since, as already explained, the city, by granting such a license, makes itself a wrong-doer;² and upon the question whether the pole was in fact so located as to be dangerous to public travel, the license from the city will not be conclusive, but the question will be submitted to a jury, provided there is evidence from which the jury could properly draw the inference that it was so located.³ It has been held that a telephone company is not liable for personal injuries resulting from a collision of a traveler with a telephone-pole, in consequence of his horse becoming frightened and unmanageable, where the pole which was set within the limits of the highway, could not have been placed nearer the fence without the cross-arms encroaching upon private property, and was set with due care and in such a position as not

¹ *Sheffield v. Central Union Tel. Co.*, 36 Fed. Rep. 164.

² *Ante*, § 29.

³ *Wolfe v. Erie Tel., etc. Co.*, 33 Fed. Rep. 320.

to obstruct or incommode the public use of the highway.¹ In this case the complaint alleged that the plaintiff, with a companion, was driving along a highway which had three traveled tracks; that the team was traveling on the north track, which was eight feet from the fence; that between this track and the fence, and about four or six feet from the fence, were defendant's telephone poles, about eleven rods apart; that the highway was almost perfectly level; that, while plaintiff was attempting to alight from the buggy, the horses became frightened by an approaching team, ran into a telephone pole, threw him out, and caused the injury complained of. It was held, on demurrer, that the complaint did not state a cause of action.²

§ 77. **Collision in Consequence of Horse Running Away.**—It has been held that if a telephone pole is placed in the roadway of a public street, or so near thereto as to be dangerous to ordinary travel, a traveler who comes into collision with such obstruction in consequence of his horse taking fright and running away, provided he uses reasonable efforts under the circumstances to manage and subdue the horse, and does not leave the box before the collision occurs, can recover damages for the injury.³ But this decision seems to be unsound in principle and opposed to good authority. In such a case the sound conclusion seems to be that it is the running away of the horse, and not the location of the pole that is the proximate cause of the damage.⁴

¹ *Roberts v. Wisconsin Tel. Co.* (Wis.), 46 N. W. Rep. 800.

² *Ibid.*

³ *Wolfe v. Erie Tel., etc. Co.*, 33 Fed. Rep. 320.

⁴ *Davis v. Dudley*, 4 Allen (Mass.), 557; *Moulton v. Sanford*, 51 Me.

§ 78. **Injuries from Overhanging Wires.**—The fact that a telegraph line crossing a highway is allowed to swing down so low as to obstruct ordinary travel, is some *evidence of negligence* on the part of the telegraph company, and, in the absence of anything to explain it, will warrant a verdict against them for damages for injuries sustained by one, who, using due care, is thrown from his vehicle by means of the wire.¹ Perhaps it is but another way of stating the same principle to say that, in an action for the death of one thrown from his carriage by a telephone wire stretched across the road, if the injuries are the natural consequence of defendant's negligence, or that of its servants, such a consequence as might have been foreseen by the servant as likely to flow from his carelessness, there being no contributory negligence, the defendant is liable.² It is not necessary, in order to establish the negligence of the defendant in such a case, to prove that the defendant had been *notified* that its wire obstructed the highway and that it refused to remove it.³ The reason is that a party who, for his own gain, occupies the public street with something which, unless properly cared for, may become dangerous to public travel, is under an affirmative duty of care and inspection, and cannot justify waiting until the city authorities or some one else notifies him that it has become dangerous.⁴ It is the ob-

127. As to injuries which are the combined result of negligence and accident, and especially in the case of injuries upon highways, see 2 *Thomp. Neg.* 1085.

¹ *Thomas v. Western Union Tel. Co.*, 100 Mass. 156; *Dickey v. Maine Tel. Co.*, 46 Me. 483.

² *Pennsylvania Tel. Co. v. Varnau* (Pa.), 15 Atl. Rep. 624.

³ *Ibid.*

⁴ See some of the cases collected in 1 *Thomp. Neg.* 343.

vious duty of any person or corporation obstructing a public street for private gain to keep the obstruction guarded, lighted, or otherwise to keep the public notified of it.¹ In line with this principle it has been justly held that if a telegraph company, engaged in constructing its line through a public and frequented street of a city, allows its wire to remain suspended across the street in a manner which obstructs travel, without guards, flags, or other notice to the public of the obstruction, it is guilty of gross negligence.² Where a wire of a telephone company fell by reason of the company's negligence, upon the trolley wire of an electric railway company, over which there was no guard wire, both companies were held liable for the value of a horse killed by coming in contact with the fallen telephone wire.³

§ 79. **Injuries from Guy Wires.**—Although the company may have the right to occupy the street with its poles, yet if it secures them by guy wires so as to endanger public travel, it must, under the principles and within the limits heretofore stated, pay any resulting damages.⁴

§ 80. **Poles Blown Down by Storms.**—If such a company does not secure its posts so that such winds as are liable to occur in the particular climate will not be likely to blow them down, it may become liable to one who sustains injury from such a catastrophe. Judicial opinion thus, to some extent, places the company betwixt the devil and the deep sea;

¹ *Manley v. St. Helens Canal Co.*, 2 Hurl. & N. 840. And see *Wiggins v. Boddington*, 3 Car. & P. 544.

² *Western Union Tel. Co. v. Eyser*, 2 Col. T. 141.

³ *United Electric R. Co. v. Shelton (Tenn.)*, 14 S. W. Rep. 863.

⁴ *Wilson v. Great Southern Tel., etc. Co.*, 41 La. An. 1041; s. c., 6 South. Rep. 781.

but their lot is somewhat mitigated by the recollection that they are not liable for damages sustained by failing to erect their poles with such strength as to withstand those great storms which, though liable to happen in any American climate, are placed by the judges in the category of "acts of God;" which is another way of saying that they are only bound to reasonable care in the construction and maintenance of their lines.¹

§ 81. **Right of Contribution by Municipal Corporation Against Electric Light Company.**—If a private person digs a hole or puts an obstruction in the street of a city whereby a traveler is injured, he may have an action for his damages, either against the author of the nuisance or against the city for permitting it to continue. The one is liable for his *misfeasance*; the other for its *non-feasance* in not discharging its public duty of keeping its streets in repair and free from nuisances dangerous to public travel. In these cases the author of the nuisance and the city are not *in pari delicto*—in equal fault—unless the city has authorized the author of the nuisance to commit it: the one is an affirmative tort-feasor; the fault of the other is negative and inadvertent. In such cases the city, if compelled to pay damages in an action by the person injured, may have an action for contribution against the author of the nuisance.² Not so where the city itself has authorized the nuisance; for then they are *in pari delicto*. When, therefore, a pole was erected by an electric light company in such a situation as to be a nuisance, but in a location approved by the

¹ Ward v. Atlantic, etc. Tel. Co., 71 N. Y. 81.

² *Ante*, p. 38, note 3. See 2 Thomp. Neg. 791.

village authorities, it was held, in an action against the village and the successor of the electric light company, that the two were *in pari delicto*, and that the village was not entitled to contribution against its co-tortfeasor.¹

§ 82. **Obstructing Navigation.**—Under Act of Congress July 24, 1866,² authorizing telegraph companies to construct telegraph lines over, under, or across navigable streams, in such manner as not to obstruct navigation, a telegraph company whose submarine cables are laid in the soft mud or silt at the bottom of a navigable river, so as to interfere with the movements of vessels which are accustomed to plow through the mud in such localities, thereby obstructs navigation.³

§ 83. **Vessels Injuring Submarine Cables.**—The owners of vessels which negligently injure submarine cables, although beyond the marine league, will be adjudged to pay damages therefor by the proper English tribunal. In one such case the plaintiffs were the owners of a telegraphic cable lying at the bottom of the sea between England and France. The defendants were aliens, and their ships, while sailing upon the high seas more than three miles from England's coast, lowered an anchor, and injured the cable. It was held that the court would presume that the masters of ships were aware of the existence and situation of submarine cables, and that a duty was thereby cast upon all such masters of ships to manage their vessels so carefully and skillfully as to avoid injuring these cables, if

¹ *Geneva v. Brush Electric Co.*, 50 Hun (N. Y.), 581; s. c., 20 N. Y. St. Rep. 424; s. c., 3 N. Y. Supp. 595.

² U. S. Rev. Stat., § 5263.

The City of Richmond, 43 Fed. Rep. 85.

possible, in the exercise of reasonable precaution.¹ In another such case a ship's anchor got entangled with an electric cable, and the cable was cut by order of the master. It was held that, under the circumstances, the master was guilty of a want of nautical skill, and that the admiralty court had jurisdiction to entertain a suit against the ship; and the ship was condemned to pay damages and costs.²

§ 84. **Electric Trains Frightening Horses.** — From a case depending on a collection of facts, the conclusion may be extracted that it is not negligence, on the part of the servants of an electric railroad company, not immediately to stop the train on seeing a frightened horse with its driver at its head near a crossing 350 or 400 feet distant, where the speed of the train is decreased, and there is nothing to indicate to the employees that there is any particular danger. It appeared that plaintiff, while driving along the avenue on which was the car line, saw a train coming around a bend about 350 or 400 feet away; that he motioned for it to stop, and got out, and took his horse by the head. The cars were then about half way to him, and slowing up; and, the horse exhibiting signs of fear, he led it across the sidewalk into an open field. The horse dragged him about the field, and finally turned, and dragged him into the street, where he fell, and was injured, and the horse ran away. The cars were running at ordinary speed, the gong was sounded as they ap-

¹ *Submarine Telegraphic Company v. Dickson*, 15 C. B. (N. S.) 759; s. c., 10 Jur. (N. S.) 211; s. c., 33 L. J. (C. P.) 139; s. c., 12 W. R. 384; s. c., 10 L. T. (N. S.) 32.

² *The Clara Killam*, 39 L. J. (Adm.) 50; s. c., L. R. 3 Adm. 161; s. c., 19 W. R. 25; s. c., 23 L. T. (N. S.) 27. British statute punishing malicious injuries to telegraph batteries, machinery wires, cables, posts, etc.: 24 and 25 Vict., ch. 97, §§ 37, 38.

proached the bend, and they stopped before reaching plaintiff. The court, speaking through Mr. Justice Grant, said: "Defendant's servants in charge of the cars were not under obligations to immediately stop them. They had fulfilled their duty by commencing to run more slowly. If such companies were obliged to stop their cars at that distance upon seeing a horse, with his owner holding him by the head, in apprehension of fright, or in actual fright, they could not meet the demands or the requirements of public travel. The defendant had an equal right to the use of the street with its cars as plaintiff with his horse. Each was bound to exercise due care and caution; and this the defendant did. It was evidently the sight of the moving cars, not their speed, that frightened the horse. They were from 150 to 200 feet distant when plaintiff and his horse went over the sidewalk into the common. It is difficult to see how the defendant's servants were under any legal obligation to act differently from what they did."¹

§ 85. **Certain Evidential Matters.**—It has been held that, in an action for damages sustained by being thrown over a telephone wire, it is competent to show that defendant, shortly after the accident, changed its line at the spot, making it higher.² It has been also held competent in such a case to give evidence as to the height of the wire on the Sunday before the accident.³ On the other hand, the fact that *others*, with loaded wagons equally high, passed under the wire without injury, did not, in the opinion of the court, raise a presumption of negligence

¹ *Cornell v. Detroit, etc. R. Co. (Mich.)*, 46 N. W. Rep. 791.

² *Pennsylvania Tel. Co. v. Varnau (Pa.)*, 15 Atl. Rep. 624.

³ *Ibid.*

on the part of deceased.¹ On the trial of an action against a telegraph company, for negligence in permitting telegraph poles to fall and suspend the wires across a highway, where a question is raised as to the soundness of the poles, it is error to admit evidence of the condition of *other poles* forty or sixty rods away, without any evidence to show that they were of the same kind, put up at the same time and equally exposed.²

¹ Pennsylvania Tel. Co. v. Varnau (Pa.), 15 Atl. Rep. 624.

² Western Union Tel. Co. v. Levi, 47 Ind. 552.

ARTICLE III.—INJURIES TO THEIR OWN EMPLOYEES.

SECTION.

- 89. Injuries to the Company's Servants.
- 90. Servant Injured through Patent Defect not Obviously Dangerous.
- 91. Injuries through the Contributory Negligence of the Servant.
- 92. Injuries to Workmen through Negligently Turning on the Current.
- 93. Injuries to Workmen by Reason of "Live" Wires Sagging upon "Dead" Wires.
- 94. Averring One Kind of Negligence and Recovering on Another.
- 95. Breaking of Elevator of Electric Light Tower.

§ 89. *Injuries to the Company's Servants.*—Whatever may be the principle applicable in case of injuries by such companies to *strangers*, it is clear that where the injury is to one of their own servants, they are liable, if at all, on the principle of negligence, and not then if the servant has been guilty of negligence materially contributing to the injury. The principles which must determine the question of such liability are laid down in the leading treatises on the law of master and servant and the law of negligence. These principles are: 1. That a servant, on entering into the service of his master, impliedly takes upon himself the risks actually incident to the business. These risks include: *a.* The risk of injury from the negligence of fellow-servants. *b.* The risk of injury from patent defects and imperfections in the machinery and

appliances supplied to him for the prosecution of his work. 2. On the other hand, the master is bound to exercise reasonable or ordinary care in the selection of other servants who are to work with the particular servant, so that they are reasonably careful and skillful and otherwise fit and proper. 3. He is bound to exercise the like care in the selection and inspection of the machinery and appliances with which the servant is required to work.¹ It may sometimes, though rarely, happen that the breakage of the appliance itself may be evidence of negligence on the part of the master, on the principle *res ipsa loquitur*. Where a lineman was putting up a telegraph wire, when both the wire and the cross-arm broke, and the lineman was thrown to the ground and killed, and there was no positive evidence that the materials were carefully selected by the company, and the evidence as to their actual soundness was conflicting, it was held that their breaking was evidence of negligence, and a judgment against the company was sustained.²

§ 90. **Servant Injured through Patent Defect not Obviously Dangerous.**—Patent defects in the appliances given the servant with which to work, not obviously dangerous, are placed by just views of the law among the ordinary risks of the service which he impliedly assumes. Thus, an employee of an electric light company, of mature age and ordinary mental capacity, who is injured by reason of a defective ladder, one rail of which was broken off near the top, both master and servant knowing

¹ Consult 2 Thomp. Neg. 969, *et seq.*, and other works on Negligence, and on the law of Master and Servant.

² *Clairain v. Western Union Tel. Co.*, 40 La. An. 178; s. c., 3 South. Rep. 625.

of the defect, and neither regarding it as dangerous, cannot recover damages therefor from the company.¹

§ 91. **Injuries through the Contributory Negligence of the Servant.**—In accepting the risks of a highly dangerous employment, the servant impliedly agrees to exercise, for the promotion of his own safety, that degree of care which is suggested by the degree of the danger; and if he is injured in consequence of failing to exercise such care, he cannot justly cast the liability upon the master. This is well illustrated by a recent case in Virginia, where it appeared that deceased, a servant of an electric light company, was sent to look for a break in the circuit while the current was on, and took with him a defective shunt-cord; that he discovered the break, and, in attempting to turn on the current, grasped the shunt-cord at its defective end, and at the same time put his other hand on the exposed end of the line wire, whereby the current passed through him and killed him; and that, had he grasped the line wire above the exposed end, he would not have been injured. It was held that, as the evidence failed to show negligence on the part of the defendant, unmixed with the contributory negligence of the deceased, the defendant was not liable.²

§ 92. **Injuries to Workmen through Negligently Turning on the Current.**—If a workman employed by an electric light company is sent to fix a lamp at an hour in the day-time when the current is regularly turned off, and if through negligence, and without giving him warning, the current is turned on at an

¹ *Jenney Electric, etc. Co. v. Murphy*, 115 Ind. 566; s. c., 18 N. E. Rep. 30.

² *Piedmont Electric, etc. Co. v. Patterson*, 84 Va. 747; s. c., 6 S. E. Rep. 4.

earlier hour than usual, whereby he is injured, he may recover damages.¹ In the case just cited, the evidence showed that at 3:30 P. M. plaintiff was sent to remove an electric lamp and connect the wires with the circuit; that the usual time for turning on the electric current was 4:30 P. M. on cloudy days, and 4:45 on clear days; that plaintiff proceeded at a "good gait, pretty fast," that when he reached the lamp and began work, it was barely 4:15 P. M., and the weather clear; and that while handling the wires, the current was turned on and he was injured. It was held that a *nonsuit* was properly refused.² It was also held that *evidence* offered by the plaintiff was admissible to show that, after the injury to the plaintiff from the shock, the defendant posted notices at its works, warning all employees at work on its lines and circuits to quit such work at 4 o'clock, and not to continue the same without notifying the officers at the works.³

§ 93. **Injuries to Workmen by Reason of "Live" Wires Sagging upon "Dead" Wires.**—A jury may infer negligence from the fact that an electric light company has so strung its wires that those of one circuit cross those of another, so that a slight sagging of one would bring the two in contact, and has maintained one circuit as a live one while employees were set to work handling with bare hands the wires of the dead circuit crossing the wires of the live circuit.⁴ In this case the action was by an employee for injuries alleged to have been received

¹ Colorado Electric Co. v. Lubbers, 11 Colo. 505; s. c., 19 Pac. Rep. 479.

² *Ibid.*

³ *Ibid.*

⁴ Kratz v. Brush Electric Light Co. (Mich.), 46 N. W. Rep. 787.

from an electric shock while trimming the company's lamps on circuit No. 11; it appeared that at that time the wires on that circuit should have been dead wires, that is, not charged with electricity. At that time the wires on circuit No. 4 were live or charged wires. The wires in the two circuits ran for some distance on the same poles, and were so placed that wires in one circuit crossed those in the other, so that when they sagged the wires of the different circuits would touch one another. It was shown that the contact of the wires would wear off the insulation; that it had worn off in places; and that where live and dead wires came in contact, at points where the insulation was worn off, the electricity would be instantly conveyed from the live to the dead wire along the whole line. It was shown that the wires of the two circuits were in contact, on the day of the injury, in several places. There was no evidence that the current was turned upon circuit No. 11. It was held that the jury had the right to infer that the electricity was transferred from some live wire on circuit No. 4 to some dead wire on circuit No. 11, at some of the crosses of these wires, and that it was not necessary that they should find the particular point of contact or the particular wires.¹ It was also held that there was no error in permitting the existence of crosses in other circuits to be shown, and the effect and causes of such crosses, this evidence being given to show that they were caused by the same manner of stringing the wires as on circuit No. 11, and that the sagging of the wires brought the wires in con-

¹ *Kratz v. Brush Electric Light Co.* (Mich.), 46 N. W. Rep. 787.

tact, wearing off the insulation and leaving the wires bare.¹

§ 94. **Averring One Kind of Negligence and Recovering on Another.**—In actions for damages for negligence the *allegata* and *probata* must correspond.² If the servant avers negligence in general terms, without specifying wherein it consists, his declaration, petition, or complaint will be good on general demurrer; though under some systems it will be subject to a motion to make it more definite and certain. But where he avers that the negligence of the defendant consisted in one thing, and then proves negligence consisting in something else, he ought not to be allowed to recover. In fact such evidence is inadmissible under the pleadings, and if objected to, and nevertheless admitted, it is error. When, therefore, in an action by an employee of an electric light company for damages sustained by the plaintiff through the breaking of the cable of an elevator by which he was ascending one of the defendant's towers to perform his duty of trimming the lights, the allegation of the complaint was that the rope had become rotten to the knowledge of the defendant, it was held that *instructions* requested by the plaintiff as to defendant's liability in case the tower, elevator, and cable were properly constructed, were rightly refused.³

§ 95. **Breaking of Elevator of Electric Light Tower.**—If an employee of such a company is injured

¹ *Kratz v. Brush Electric Light Co.* (Mich.), 46 N. W. Rep. 787.

² *Schneider v. Missouri, etc. R. Co.*, 75 Mo. 295; *Gurley v. Railway Co.*, 93 Mo. 445; *Harty v. Railway Co.*, 95 Mo. 368; *Conway v. Railway Co.*, 24 Mo. App. 235.

³ *Weiden v. Brush Electric Light Co.*, 73 Mich. 268; s. c., 41 N. W. Rep. 269.

in consequence of an elevator of an electric light tower breaking while he is ascending it to trim the lamps, it will not be a good defense that his lamps were already trimmed, and that he was consequently not in the performance of his duty. If he was proceeding in good faith and without negligence in the discharge of the duty which he owed to his master, the latter will be none the less liable from the mere fact that the servant may have been mistaken as to the necessity of performing the particular duty on the particular occasion.¹

¹ *Weiden v. Brush Electric Light Co.*, 73 Mich. 268; s. c., 41 N. W. Rep. 269.

CHAPTER V.

THE LAW RELATING TO TELEPHONES AND TELEPHONE COMPANIES.

SECTION.

100. Description of a Telephone.
101. Classed with Telegraph Companies.
102. The Telephone Patents.
103. Mistakenly Pronounced a Common Carrier.
104. A Public Agency, and Subject to Public Regulation.
105. No Defense that Corporation Uses Agencies Protected by United State Patents.
106. Compelled by Mandamus to Serve the Public Equally.
107. Contract with Parent Company no Defense.
108. Pleading in Such Actions: Instances of a Responsive Answer.
109. Compelled to Furnish Equal Facilities to Telegraph Companies.
110. Illustrations.
111. A Contrary View.
112. What if Company have Lines Extending into Other States.
113. State Regulation of Interstate Messages Void.
114. State May Regulate Price of Service.
115. Powers Under Revised Statutes of Missouri: Power of State to Regulate Charges.
116. City of St. Louis no Power to Regulate Charges for Telephone Service.
117. Decisions Under Indiana Statute.
118. Attempted Evasions of Statutory Penalty.
119. Regulation Against Use of Instrument by Rival Company.
120. Regulation as to Improper Language.
121. Telephonic Communication as Evidence.
122. Admissibility of Conversations Received through a Public Telephone Operator.
123. Where the Voice of the Speaker is Recognized.

130 LAW RELATING TO TELEPHONE COMPANIES.

- 124. Admissibility of Answers of Person Called up Where Voice not Recognized.
- 125. Reasons for Holding Such Testimony Admissible.
- 126. Taxation of Telephone Companies.
- 127. Taxation of Stock of Parent Corporation in Local Corporation.
- 128. License Tax.
- 129. Privileged Taxation of Telegraph Companies.
- 130. Statutory Schemes of Taxation.

§ 100. **Description of a Telephone.**—The judicial courts have descended to the minuteness of defining a telephone. The Supreme Court of Indiana has pronounced it an “organized apparatus or combination of instruments, usually in use in transmitting as well as in receiving telephonic messages.”¹ The same court, in a subsequent case, has pointed out that a telephone differs from a *telegraph* in this, that the telegraph requires for its operation *experts*, generally supplied by the company, and that telegraph instruments in one office would be of no use without such experts. “But a telephone is entirely different. A telephone, with proper connections and facilities for use, can be used for any purpose; it requires no experience to operate it.”²

§ 101. **Classed with Telegraph Companies.**—A telephone being a new species of telegraph, it has been held that a statute applicable to the incorporation of telegraph companies may be deemed to apply to telephone companies, although the latter are not named.³ Hence, under a statutory power to construct and operate telegraphs a company may

¹ Central Union Telephone Co. v. Bradbury, 106 Ind. 1.

² Central Union Telephone Co. v. Falley, 118 Ind. 194; s. c., 10 Am. St. Rep. 114, 123.

³ Wisconsin Telephone Co. v. Oshkosh, 62 Wis. 32; s. c., 21 N. W. Rep. 828; Roberts v. Wisconsin Tel. Co. (Wis.), 46 N. W. Rep. 800.

establish a telephone service.¹ Telephone companies are to be classed with telegraph companies in determining the *jurisdiction of justices of the peace* over actions against them, under the Iowa statutes.²

§ 102. **The Telephone Patents.**—A history of the invention of the telephone and of the various devices and discoveries which preceded the invention of Alexander Graham Bell is given in the elaborate decision of the Supreme Court of the United States in what are known as “The Telephone Cases,” which consume an entire volume of the official reports of that court.³ The decision, which upheld the patent granted to Mr. Bell, was made by a divided court, three justices dissenting.⁴ A sad interest attaches to the case from the fact that the majority opinion was the last opinion delivered by Chief Justice Waite. He came upon the bench sick, to deliver it, and died two or three days afterwards.⁵ The decision of the court turned chiefly on questions of fact, and the case is not understood as establishing any new principle of law. It is valuable chiefly as a history of the invention of the telephone. It is not within the scope of this work to discuss any question relating to the law of patents for inventions; but we venture to reprint

¹ *Cumberland Telephone Co. v. United Electric R. Co.*, 42 Fed. Rep. 273. See also *Attorney-General v. Telephone Co.*, 6 Q. B. Div. 244.

² *Franklin v. Northwestern Tel. Co.*, 69 Iowa, 97.

³ *The Telephone Case*, 126 U. S. 1; s. c., *sub. nom.* *Dolbear v. American Bell Tel. Co.*, 126 U. S. 147; s. c., 8 Sup. Ct. Rep. 778.

⁴ Those who concurred were: Mr. Chief Justice Waite, who wrote the opinion of the court, and Justices Miller, Matthews, Gray, and Blatchford. Those who dissented were Justices Field, Bradley and Harlan. Mr. Justice Lamar did not sit in the case.

⁵ A memorial relating to the life and judicial services of that high-minded, courteous and excellent judge is published in the same volume as the report of the telephone cases: 126 U. S. 586, *et seq.*

an abstract of this decision from the pages of the American Digest for 1888, as being seemingly the best abstract of it which has been made, and as giving a brief outline history of the invention :

“ In the apparatus made by Reis, of Germany (who was himself anticipated by Bourseul), in 1860, with its several modifications, as described in his prospectus of 1865, and his catalogue of 1866, and also by Legat, Van der Weyde, Ferguson, and others, an intermittent or pulsatory current was employed; the transmitter, when actuated by the sound waves, making and breaking the circuit at each vibration. It was held that the apparatus was, from its very nature, unable to send and receive articulate speech, and was not in anticipation of letters No. 174,465, of March 7, 1876, to A. G. Bell, for ‘improvements in telegraphy,’ whose essential elements are the employment of the undulatory, as distinguished from the pulsatory, current, to transmit and copy air vibrations corresponding exactly in amplitude, rate, and form to those of the human voice, and the apparatus therefor. * * * Letters No. 186,787, of January 30, 1877, to A. G. Bell, for ‘improvements in electric telephony,’ are for the mechanical structure of an electric telephone, to produce the electric action on which letters No. 174,465, of March 7, 1876, to said Bell ‘for improvements in electric telegraphy,’ rests. The fifth claim of the patent of 1877 is as follows: ‘The formation, in an electric telephone, such as herein shown and described, of a magnet, with a coil upon the end or ends of the magnet nearest the plate. *Held*, the claim, as a whole, being for an electric telephone, in the construction of which the plate or diaphragm, the permanent magnet, sound in the box, speaking tube, etc., or any of them, are used, and not for the several things in and of themselves, it was not anticipated by the magnet in Hughes’ printing telegraph, as described in Schellen’s work. * * * Nor is anticipation to be found in the patent of C. F. Varley, of London, England—granted, one, June 2, 1868, and the other October 8, 1870—for ‘improvements in electric telegraphs;’ the specifications thereto not indicating that the patentee had in mind ‘undulations,’ resulting ‘from gradual changes of intensity exactly analogous to the changes in the density of air occasioned by simple pendulous vibrations,’ which was Bell’s discovery, and on which his art rests; and it being apparent that Varley’s only purpose was to

superpose on the ordinary single current another which, by the action of the make and break principle of the telegraph, would do the work he wanted. * * * Nor was the Bell patent anticipated by James W. McDonough; his application of April 10, 1876, for a patent, which was rightly refused on the ground of anticipation by Reis, making a 'circuit-breaker,' so adjusted as to 'break the connection by the vibrations of the membrane,' one of the elements of his inventions. * * * The fact that the particular instrument which Bell had, and which he used in his experiments, did not, under the circumstances in which it was tried, reproduce the spoken words so that they could be clearly understood, does not invalidate this patent; the proof being abundant, and of the most convincing character, that other instruments, carefully constructed, and made exactly in accordance with the specifications, did and will operate successfully, though not so perfectly as instruments made on the principle of the microphone, or the variable resistance method."¹

§ 103. **Mistakenly Pronounced a Common Carrier.**—One court has fallen into the curious aberration of pronouncing a telephone (not a telephone company) to be a common carrier. "Although of recent date," says OLDS, J., "it has become of important use in the transaction of business, and there is no other invention or device to supply its place. While it may not supply and take the place of the telegraph in many instances and for many purposes, yet in others it far surpasses it, and is and can be put to many uses for which the telegraph is unfitted, and by persons wholly unable to operate and use the telegraph. It has been held universally by the courts, considering its use and purpose, to be an instrument of commerce, and a *common carrier of news*, the same as the telegraph, and, by reason of being a common carrier, it is subject to proper obligations, and to conduct its business in a man-

¹ *Dolbear v. American Bell Telephone Co.*, 126 U. S. 147-275; s. c., 8 Sup. Ct. Rep. 778.

ner conducive to the public benefit, and to be controlled by law.”¹

§ 104. **A Public Agency and Subject to Public Regulation.**—What the court intend in the foregoing quotation is to lead up to the conclusion that a telephone is a public agency, and that a telephone company is consequently subject to public regulation. “To conduct the business of the telephone,” continues OLDS, J., “by public telephone stations, and by sending messengers to notify persons with whom a patron of the company desires to converse in other parts of the city, to compel the person desiring to converse with others to remain at the public telephone station until the persons with whom they desire to converse can be notified, and so arrange their business as to leave it and go to another telephone station and hold a conversation, renders the use of the telephone almost worthless. It is by reason of the fact that business men can have them in their offices and residences, and, without leaving their homes or their places of business, call up another at a great distance with whom they have important business, and converse without the loss of valuable time on the part of either, that the telephone is particularly available as an instrument of commerce.”²

§ 105. **No Defense that Corporation Uses Agencies Protected by United States Patents.**—The mere fact that a corporation conducts its business through

¹ Central Union Telephone Co. v. Falley, 118 Ind. 194; s. c., 10 Am. St. Rep. 114, 124. See *post*, § 137, *et seq.*

² Central Union Telephone Co. v. Falley, 118 Ind. 194; s. c., 10 Am. St. Rep. 114. Learned discussions of this subject will be found as follows: By J. McCall, 28 Cent. L. J. 357; by S. S. Merrill, 28 Cent. L. J. 40, n; by Robert Desty, 5 Lawyers' Rep. Ann'd, 161, n.

inventions protected by patents granted by the United States, does not, where its use is a public use, exonerate it from control by State legislation, if the public welfare demands it. Thus, a telephone company, using instruments for the transmission of the sound of the human voice which are thus protected, have been frequently held subject to State regulation.¹ The distinction has been thus stated: "The right to enjoy a new and useful invention may be secured to the inventor and protected by national authority against all interference. But the use of tangible property which comes into existence by the application of the discovery is not beyond the control of State legislation, simply because the patentee acquires a monopoly in his discovery. 'The sole operation of the statute is to enable him to prevent others from using the products of his labors without his consent; but his own right of using is not enlarged or affected.' The property of an inventor in a patented machine, like all other property, remains subject to the paramount claims of society, and the manner of its use may be controlled and regulated by State laws when the public welfare requires it." ²

§ 106. **Compelled by Mandamus to Serve the Public Equally.**—By analogy to the rule respecting rail-

¹ *State v. Telephone Co.*, 36 Ohio St. 296; s. c., 38 Am. Rep. 584; *Chesapeake, etc. Tel. Co. v. Baltimore, etc. Tel. Co.*, 66 Md. 399; *Commercial Union Tel. Co. v. New England Teleph., etc. Co.*, 61 Vt. 241; s. c., 17 Atl. Rep. 1071; 6 Rail. & Corp. L. J. 147; 5 L. R. A. 161; 40 Alb. L. J. 186.

² *McIlvalne, C. J.*, in *State v. Telephone Co.*, *supra*; citing *Jordan v. Overseers*, 4 Ohio, 295; *Patterson v. Kentucky*, 97 U. S. 501. So held in *Hockett v. State*, 105 Ind. 250; s. c., 55 Am. Rep. 201.

way companies,¹ gas-light companies,² and other corporations charged with the performance of public duties,³ it is held that a telephone company can be compelled by mandamus to serve the public equally. That is to say, a mandamus will be granted at the suit of A. to compel such a company to render him its services at the same price as it renders them to B. under like circumstances.⁴ "Any person or corporation engaged in telephone business, operating telephone lines, furnishing telephonic connections, facilities, and service to business houses, persons and companies, and discriminating against any person or company, can be compelled, by mandate, on petition of such person or company discriminated against, to furnish the petitioner a like service as is furnished to others."⁵ Such a company can be compelled by mandamus to place and maintain in the office of the relator a telephone and transmitter such as are usually furnished to other subscribers of the company.⁶

¹ *Vincent v. Chicago, etc. R. Co.*, 49 Ill. 33; *Chicago, etc. R. Co. v. People*, 56 Ill. 365; s. c., 8 Am. Rep. 690.

² *People v. Manhattan Gas-Light Co.*, 45 Barb. (N. Y.) 136.

³ *Munn v. Illinois*, 94 U. S. 113.

⁴ *State v. Nebraska Telephone Co.*, 17 Neb. 126; s. c., 52 Am. Rep. 404; *Central Union Telephone Company v. Falley*, 118 Ind. 194; s. c., 10 Am. St. Rep. 114, 125; 19 N. E. Rep. 604; *Louisville Transfer Co. v. American District Telephone Co.* (Louisville Chancery Court), 38 Am. Rep. 588, note; *Central, etc. Tel. Co. v. State*, 118 Ind. 598; *Central Union Tel. Co. v. State*, 123 Ind. 113; s. c., 24 N. E. Rep. 215.

⁵ *Central Union Telephone Co. v. Falley*, *supra*.

⁶ *State v. Nebraska Telephone Company*, 17 Neb. 126; s. c., 52 Am. Rep. 404; *State v. Telephone Co.*, 36 Ohio St. 296; s. c., 38 Am. Rep. 583. That such a company is charged with the obligation of receiving and transmitting messages with impartiality and in good faith, see *St. Louis v. Bell Telephone Co.*, 96 Mo. 623. That the remedy by mandamus is an appropriate one, see *State v. Hartford, etc. R. Co.*, 29 Conn. 538; *People v. Albany, etc. R. Co.*, 24 N. Y. 261, and other cases above cited. Unjust discrimination by telephone companies prohibited: Virginia Act Nov. 26, 1888; Acts 1888, No. 124, p. 132.

§ 107. Contract With Parent Company no Defense.

—Moreover, where such an obligation is imposed by the statute law—and the rule would equally hold in respect of the same obligation as it exists at common law,—a local telephone company, owning or operating telephone lines or exchanges within the State, cannot be exonerated from the performance of the duty imposed by law, by any conditions or restrictions imposed by contract with the owner of the instruments employed and of the invention applied; and such a telephone company, refusing to give to a *telegraph company* the facilities afforded by it to others, except subject to restrictive conditions imposed by such a contract discriminating in favor of another telegraph company, may be compelled by mandamus to furnish them. The fact that a telephone is a patented instrument, and protected by letters patent granted to the assignor of the parent company, constitutes no defense, since the immunity conferred by the patent cannot operate to exclude any portion of the public from the benefit of it.¹

§ 108. Pleading in Such Actions: Instance of a Responsive Answer.—A petition for a mandamus to compel respondent to furnish telephone service at the usual charge, alleged a tender of the rent charged to others whose places of business were as far from respondent's office as that of relator's, the refusal of the tender and a demand for higher rent. An answer denying that the sum stated was the usual rent for the service required, and averring

¹ *Chesapeake, etc. Telephone Co. v. Baltimore, etc. Tel. Co.*, 66 Md. 399; *Commercial Union Tel. Co. v. New England Telephone, etc. Co.*, 61 Vt. 241; s. c., 17 Atl. Rep. 1071.

that, for the price usually charged to others at a like distance as relator's from the central office, respondent was willing and ready to furnish the required apparatus, without ambiguity or evasion, responded to and denied the allegation of the petition.¹

§ 109. **Compelled to Furnish Equal Facilities to Telegraph Companies.**—Moreover, such a company can be compelled by mandamus to furnish to one *telegraph company* the same facilities for the conduct of its business which it furnishes to another telegraph company, and a contract by which it undertakes to confer exclusive privileges in this respect upon a certain telegraph company, is against public policy and void.²

§ 110. **Illustration.**—Thus, the American Bell Telephone Company entered into a contract with the Columbus Telephone Company, of Ohio, granting to the latter the use of its instruments, but providing that the Western Union Telegraph Company should perform all telegraphic transmissions in connection with such use. The American Union Telegraph Company, and the Baltimore & Ohio Railroad Company, which was using the telegraph facilities furnished by the American Union Company, were allowed a mandamus to compel the Columbus Tele-

¹ Central District, etc. Telephone Co. v. Com., 114 Pa. St. 592; s. c., 7 Atl. Rep. 926; 6 Cent. Rep. 151; 11 East. Rep. 645.

² State v. Telephone Co., 36 Ohio St. 296; s. c., 38 Am. Rep. 583; Chesapeake, etc. Telephone Co. v. Baltimore, etc. Tel. Co., 66 Md. 399; s. c., 23 Reporter, 469; 7 Atl. Rep. 809; 6 Cent. Rep. 472; 9 East. Rep. 717; 35 Alb. L. J. 271; Commercial Union Tel. Co. v. New England Telephone, etc. Co., 61 Vt. 241; s. c., 6 Rail. & Corp. L. J. 147; 5 L. R. A. 161; 40 Alb. L. J. 186; 17 Atl. Rep. 1071. So held by Judge Thayer of the St. Louis Circuit Court in *State ex rel. v. Bell Telephone Co.*, 44 Am. Rep. 241, note.

phone Company to furnish and put up a telephone for their accommodation and use.¹

§ 111. **A Contrary View.**—A contrary view has obtained in Connecticut, under substantially the same state of facts as those existing in the cases last cited. The Bell Telephone Company, a corporation situated in Massachusetts, and the owner of several patents for transmitting the sounds of the human voice over wires by means of electricity, conferred upon a local company, called the Connecticut Telephone Company, organized as a joint stock company, under the laws of Connecticut, a certain license to use its inventions within the city of Bridgeport, in Connecticut, upon certain conditions, one of which was that the Connecticut company should not allow any telegraph company to use the system of telephonic exchange which it was authorized to operate in Bridgeport, for the purpose of receiving from its customers messages to be sent, or of delivering to them messages which had been received over its wires, unless such company had purchased from the American Bell Telephone Company the right to use that system. It appeared that the Western Union Telegraph Company had purchased from the American Bell Telephone Company the right, *exclusive* of all other telegraph companies, to use their telephone exchange system, which might be established in the United States under the patents of the American Bell Telephone Company in connection with their business, and that it was then in use of the system of the Connecticut Company in Bridgeport, to the exclusion of the plaintiff. The plaintiff was a rival telegraph company, called the American

¹ State v. Telephone Co., 36 Ohio St. 296; s. c., 38 Am. Rep. 583.

Rapid Telegraph Company, and, in a proceeding by mandamus, which developed this state of facts, the court held that it was not entitled to the relief sought. The theory of the court was that the American Bell Telephone Company, of Massachusetts, could impose the restrictions above stated upon a grant of its license to the company in Connecticut, and that the imposition was valid; in other words, that the Connecticut company could not acquire any greater right to the use of the patents of the Massachusetts company than the latter should choose to grant. The decision was rendered in the face of a statute of Connecticut providing, in effect, that every telephone company should with impartiality permit persons and corporations to transmit speech by wire through its instruments.¹ The decision is entitled to very little respect.

§ 112. **What if Company have Lines Extending into Other States.**—The statutes of Indiana elsewhere referred to,² are construed as intended only to control telephone service within the State, and, so limited, they are not an interference with *interstate commerce*, although a company have lines extending into other States.³ Accordingly it was held that, on a complaint demanding telephone connections and facilities for communication in a certain city, to which complainant is by law entitled, and for which the legal compensation for such city connections has been tendered, the telephone company cannot defend on the ground that to furnish con-

¹ American Rapid Telegraph Company v. Connecticut Telephone Co., 49 Conn. 352; s. c., 44 Am. Rep. 237.

² *Post*, § 117.

³ Central Union Telephone Co. v. Falley, 118 Ind. 194; s. c., 19 N. E. Rep. 604.

nections would put complainant in connection with the company's offices outside the State.¹

§ 113. **State Regulation of Interstate Messages Void.**—On constitutional principles already considered,² it has been held by the Court of Chancery of New Jersey that a message sent by telephone from one State to another is commerce between the States, and cannot be prohibited or regulated by injunction in either State, against persons or corporations engaged in sending such messages, because they or it do not pay the *taxes* assessed against it by such State.³ Vice-Chancellor Bird, in giving the opinion of the court, after reviewing the applicatory authorities in the matter stated in the note below,⁴

¹ Central Union Telephone Co. v. Falley, 118 Ind. 194; s. c., 19 N. E. Rep. 604.

² *Ante*, § 5.

³ *In re Pennsylvania Telephone Co.* (N. J.), 9 Rail. & Corp. L. J. 112; s. c., 20 Atl. Rep. 846.

⁴ "This additional assessment the defendant insists is unlawful. Its resistance to the payment of this additional tax is based upon the doctrine that it is unconstitutional for any State to attempt to regulate commerce between the States; and that business of this character originating in one State and terminating in another is such commerce. I believe this principle was so recognized in the case of *Cable Co. v. Attorney-General*, 1 Dicks' 270. In that case Mr. Justice KNAPP said, in delivering the opinion of the court of errors and appeals: 'Railroads and telegraphs may become instruments of interstate or international commerce, and when, as such instrument, they are in action, they may not be obstructed by statute imposition and restrictions; hence it was held, in *Telegraph Co. v. Massachusetts*, 125 U. S. 530; s. c., 8 Sup. Ct. Rep. 961, that, the telegraph company having brought itself within the provisions of the Act of Congress of July 24, 1866, entitled 'An act to aid in the construction of telegraph lines, and to secure to the government the use of the same for postal, military, and other purposes,' collection of a tax imposed upon the telegraph company on its property in Massachusetts could not be enforced by injunction, although the taxing act provided for that as one mode of enforcing payment; the reason being that an injunction enforced in that State would put a stop to its general operation. The tax, however, was held to be valid, and the State was left to its other remedies for its collection. *Pensacola Telegraph Co. v. Western Union Tel. Co.*, 96 U. S. 1; *Telegraph Co. v. Texas*

said: "The case of *Coe v. Errol*¹ marks the point where the subject of commerce passes out of the State's power to tax, and comes within federal protection." "That point is not reached when they become finished production. It is there held that goods, the product of a State, intended for exportation to another State, are liable as part of the general mass of property of the State of another origin, until actually started in course of transportation to the State of their destination, or are delivered to a common carrier for that purpose. These principles are as applicable to messages by telephone as to merchandise. There can be no reasonable distinction made between the office of common carrier of telephone, and the office of a common carrier of goods by railway or steamboat. In both cases it is commerce between the States. In every such instance, the consideration is, when is the transaction within the constitutional regulation? The disputes which have led to judicial determination of the various questions have been respecting those conditions which, upon the one hand, were deemed commerce, and upon the other, not. I think, therefore, the injunction prayed for in this case ought not to be allowed; for, if it were to be allowed, it would most certainly, though indirectly, control commerce between States."

§ 114. **State May Regulate Price of Service.**—Telephone companies being public agencies dis-

105 U. S. 460, are all instances of illegal interference with companies as instruments for commerce. But each of these cases holds the companies to be subject to taxation, otherwise legal, which do not obstruct or place a direct burthen upon them either as instruments of general commerce or as agents of the United States.

¹ 116 U. S. 517; s. c., 6 Sup. Ct. Rep. 475."

charging public duties analogous to those of common carriers, or, as they are often called, common carriers of messages or of news, the State may limit the price at which they shall render their services to the public, in like manner as it may limit the charges of public warehouses and of common carriers whose lines exist wholly within the State.¹

§ 115. **Powers under Revised Statutes of Missouri: Power of State to Regulate Charges.**—Telephone companies incorporated under Article 5 of Chapter 21 of the Revised Statutes of Missouri, of 1879, have power to own and operate telephone lines, to establish reasonable charges for the use of the same, and to condemn private property for a right of way. On the other hand, they are charged with the duty of receiving and transmitting messages with impartiality and good faith, are subject to public regulations, including the right of the State to establish a maximum rate for service, and this power may be delegated to municipal corporations.²

§ 116. **City of St. Louis no Power to Regulate Charges for Telephone Service.**—The charter of the City of St. Louis giving to the mayor and assembly power "to license, tax and regulate telegraph companies or corporations, and all other business, trades,

¹ *Hadett v. State*, 105 Ind. 250; s. c. 55 Am. Rep. 201. Compare *State v. Bell Telephone Co.*, 23 Fed. Rep. 539; *Johnson v. State*, 113 Ind. 143; *Central Union Telephone Co. v. Falley*, 118 Ind. 194; s. c., 10 Am. St. Rep. 114; *St. Louis v. Bell Telephone Co.*, 96 Mo. 623; s. c., 9 Am. St. Rep. 370. If the doctrine of the decisions so holding were at all in doubt, it would be firmly grounded by the great case of *Munn v. Illinois*, 94 U. S. 113, upholding the power of a State to regulate the charges of public grain elevators. See also *Onachita Packet Co. v. Aiken*, 121 U. S. 444; *Patterson v. Kentucky* 97 U. S. 501.

² *St. Louis v. Bell Telephone Co.*, 96 Mo. 623; s. c., 9 Am. St. Rep. 370; 10 S. W. Rep. 197.

vocations, or professions whatever," makes telephone companies, *ejusdem generis* with telegraph companies, though the former were not in existence at the date the charter was granted; but this power to "regulate," when applied to telephone companies, does not carry with it the power to fix a rate of charges by ordinance for telephone service. Nor is such a power included by the "general welfare" clause of the charter of the city of St. Louis, which empowers it "to pass all such ordinances, not inconsistent with the provisions of this charter or the laws of the State, as may be expedient, in maintaining the peace, good government, health, and welfare of the city, its trade, commerce and manufactures," etc.;¹ nor in the power to regulate the use of the streets, and an ordinance regulating such charges cannot be upheld upon any such ground.² This defect in the charter powers of the city of St. Louis was supplied by the legislature at its next session, by enacting that all provisions granting to persons authority to erect, etc., and to cities and towns authority to regulate telegraph or telephone lines, shall, so far as applicable, apply to the lines for transmission of intelligence by telephone, whether the same be by electricity or otherwise.³

§ 117. **Decisions under Indiana Statute.**—Under the Indiana statute,⁴ such a company, doing a general business, will be compelled to furnish any person within the local limits of its business, in any town or city, with a telephone and connections for

¹ *St. Louis v. Bell Telephone Co.*, 96 Mo. 623.

² *Ibid.*

³ Mo. Act. June 7, 1889; Acts 1889, ch. 434 p. 270.

⁴ Act. Ind. April 8, 1885, §§ 2, 3.

his own use; and it was no defense to say that the company did not rent telephones, but furnished such service by means of public stations only.¹ The company cannot avoid liability for refusal by adopting a different scheme, and charging a certain sum for each conversation, instead of charging rentals.² Nor is the right to a mandate to compel a telephone company to give telephone connections and facilities, as required by statute, abridged or taken away by the fact that the statute fixes a penalty for the violation of the law.³

§ 118. **Attempted Evasion of Statutory Penalty.**—Nor can such a company, charging more than the statute prescribes, evade the statutory penalty by a transparent attempt to divide the items of the charge so as to evade the law.⁴

§ 119. **Regulation against Use of Instrument by Rival Company.**—A by-law of a telephone company may not withhold from one citizen facilities which it grants to another. It may make and enforce a regulation that a subscriber shall not use his instrument in transmitting messages for a rival company. It may not, however, enforce a regulation that he shall not call messengers except from the central office of the telephone company. Such a regulation is unreasonable, since the business of supplying messengers is in nowise essential to the conduct of

¹ Central Union Telephone Co. v. Bradbury, 106 Ind. 1; s. c., 5 N. E. Rep. 721; Central Union Tel. Co. v. Falley, 118 Ind. 194; s. c., 19 N. E. Rep. 604; Same v. Same, 118 Ind. 598; s. c., 20 N. E. Rep. 145.

² Central Union Telephone Co. v. Falley, 118 Ind. 194; s. c., 19 N. E. Rep. 604.

³ *Ibid.*

⁴ Johnson v. State, 113 Ind. 143.

the business of transmitting messages by telephone, for which the company was incorporated.¹

§ 120. **Regulation as to Improper Language.**—A regulation of a telephone company prohibiting the use of improper, vulgar or profane language in communicating over its wires, has been held reasonable.²

§ 121. **Telephonic Communications as Evidence.**—In a recent case in Missouri the question arose upon the admission as evidence of conversation held through the telephone between some one at the instrument in the plaintiff's private office and the witness. It was admitted, though the witness did not identify the voice of the speaker as that of either of the plaintiffs or their clerk, and the court held that the ruling was proper. BARCLAY, J., said: "The courts of justice do not ignore the great improvements in the means of intercommunication which the telephone has made. Its nature, operation, and ordinary uses, are facts of general scientific knowledge, of which the courts will take judicial notice as part of public contemporary history. When a person places himself in connection with the telephone system through an instrument in his office, he thereby invites communication, in relation to his business, through that channel. Conversations so held are as admissible in evidence as personal interviews by a customer with an unknown clerk in charge of an ordinary shop would be, in relation to the business there carried on. The fact that the voice at the telephone was not identified does not render the conversation inadmissible. The

¹ *People v. Hudson River Telephone Co.*, 19 Abb. N. Cas. (N. Y.) 466; s. c., 10 N. Y. St. Rep. 282.

² *Pugh v. Telephone Co.*, 27 Alb. L. J. 161, 163.

ruling here announced is intended to determine merely the admissibility of such conversations in such circumstances, but not the effect of such evidence after its admission. It may be entitled, in each instance, to much or little weight, in the estimation of the triers of fact, according to their views of its credibility, and of the other testimony in support or in contradiction of it."¹

§ 122. **Admissibility of Conversations Received Through a Public Telephone Operator.**—It has been held in Kentucky, by a divided court, that where a conversation takes place, not directly between the parties over the telephone, but through the operator in charge of a public telephone station—the person who receives the message from the operator can state what the operator told him—that is, can detail the message as the operator delivered it to him, provided there was other evidence that the party assumed to be speaking at the other end of the line did use the instrument at the time.²

§ 123. **Where the Voice of the Speaker was Recognized.**—A telephone, it is well known, delivers a

¹ *Wolfe v. Missouri Pacific R. Co.*, 97 Mo. 473; s. c., 10 Am. St. Rep. 331. The learned editor of the *New York Law Journal* indulges in the following comments on the last cited decision: "We have always felt doubtful as to whether the court did not go a little too far in this case. It is evident that a clerk in an ordinary shop, in apparent charge thereof, has a somewhat different authority to speak for his employer than an unknown person speaking over a telephone. In each case it is a question of presumptive evidence, but the presumption is very much stronger in the case of the clerk in the store than of the speaker over the telephone. The question as to where is the clerk is absolutely determined; as to where is the speaker over the telephone is only a matter of very great probability. On the second point, that an identification of the voice of the speaker through the telephone is not necessary to make his declarations admissible, we think the court went to a very great extreme, and we doubt whether this ruling should be followed."

² *Sullivan v. Kuykendall*, 82 Ky. 483; s. c., 56 Am. Rep. 901.

sort of metallic voice ; yet it may be assumed that whatever peculiarities of speech a particular person may possess will be disclosed by this instrument. Whatever skepticism may exist as to the power to recognize the voice of a particular person over the telephone, it has been held, even in a criminal case, that where a witness testifies that he called up a particular person over the telephone, and recognized his voice, he may testify as to the communication which he made.¹

§ 124. **Admissibility of Answers of Person Called up where Voice not Recognized.**—This question was considered at length in a decision of the St. Louis Court of Appeals in 1886. The sole question which arose on the record was whether the court erred in admitting evidence of a conversation had through a telephone between the plaintiff's book-keeper and a person who answered to the defendant's name. The book-keeper testified that he "called up by telephone to the general office of the Bell Telephone Company for defendant's number, and was, by the central office, connected therewith ; that the list of the telephone company showed that the defendant had two telephones, one at his undertaking establishment on Franklin avenue, in the city of St. Louis, and another at his livery stable, on Olive street ; that witness was not certain which number he called, but that his best recollection was that it was the Olive street number ; that there was an answer from the defendant's number to the telephone call ; that he (the witness) did not know whose voice it was, and does not now know ; that the witness did

¹ *People v. Ward* (N. Y. Oyer & Terminer, 1885), 3 N. Y. Crim. Rep. 483.

not know the defendant's voice, and did not know the defendant, but that he asked, through the telephone, if that was Stahl (the defendant), and the answer was 'Yes.''' The witness was then asked to give the conversation then had through the telephone with the party answering the call. In response to this question the witness testified, against the objection of the defendant, "that he asked why the defendant did not pay the bill for which this suit was brought, and that party answering said, 'All right; I will attend to the matter about the first of the month.''' A previous witness had testified for the plaintiff to a conversation through the telephone in a similar manner with the defendant, whose voice the former witness identified.¹

§ 125. **Reasons for Holding Such Testimony Admissible.**—The foregoing case is not found in any of the digests; it has entirely escaped the attention of the legal periodicals; yet as it is the only case in which the subject has been considered on the analogous authorities, the writer feels justified in subjoining the argumentative portion of the opinion entire. THOMPSON, J., delivering the opinion of the court, said:

"We are of the opinion that the court correctly ruled that the testimony was admissible. We should have no difficulty in so holding upon principle, but we find on examination of the books several decisions upon analogous rules touching the admissibility of evidence. It is said by a recent writer of reputation: 'Evidence that a person making a tender, found at the place of business of the other party a person answering to the name, who said he was the man and admitted the contract to be his, but refused to pay the money, is competent to go to the jury upon the question of identity, and sufficient to uphold a verdict.'² It has been

¹ *Globe Printing Co. v. Stahl*, 23 Mo. App. 451.

² *Abbott's Trial Evidence*, 316.

held in Massachusetts that a letter received through the post-office, purporting to be written in reply to a letter sent to the person by whom it purports to be signed, is admissible without proof of the handwriting, though the question was not deemed important and was not much considered.¹ * * * In a case in the Superior Court of New York City, evidence that, on two or three occasions when the witness first called at the place of business of the defendant's testator, witness was told that the testator was out of town and that there was no one to represent him, and that subsequently the witness found there a person answering to the name of the defendant's testator, who said that he was the man and admitted the contract sued on to be his, but refused to pay the money due thereon, was held competent to go to the jury on the question of his identity and sufficient to uphold a verdict for the plaintiff, in the absence of any evidence tending to raise a suspicion of mistake or collusion.²

"Several analogous English cases are also found. Thus, where a witness, called to prove the defendant's handwriting, had corresponded with a person bearing his name, who dated his letters from Plymouth Dock, where the defendant resided, and where it appeared, that no other person of the same name lived, this evidence of the defendant's identity was held sufficient.³

"In like manner it was held by Lord Kenyon at *nisi prius* that if a letter be sent to a particular person, and an answer be received in due course, the fair presumption is that the answer was written by the person addressed in the letter; and accordingly he ruled that a witness who had so written such a letter and received such an answer, might be examined as to the genuineness of another paper, for the purpose of showing whether it was or was not written by the person with whom he had this correspondence.⁴

"In an action for damages for a negligent injury in navigation, it was objected that the evidence did not show that the defendant was the pilot in charge of the vessel, whereupon the plaintiff called out in open court, 'Mr. Henderson' (the name of the defendant), and a man in court answered, 'Here; I am the pilot.' A witness then testified that the man who had so answered was at the time acting as pilot. It was held, reversing an order directing

¹ State v. Bradish, 14 Mass. 296.

² Howard v. Holbrook, 9 Bosw. (N. Y.) 237, 243.

³ Harrington v. Fry, Ryl. & M. 90.

⁴ Carey v. Plitt, Peake Add. Cas. 130.

a nonsuit, that this was sufficient evidence of identity to go to the jury.¹

"In another case the witness had stated that he had introduced a person of the name of the defendant to the plaintiff as a customer, and that he saw him write a letter, which was produced, and which established the plaintiff's claim; but the witness had not seen the person since, and did not know that he was the defendant. It was held that this evidence was admissible, and was sufficient to support a verdict for the plaintiff.²

"In an action against an alleged acceptor of a bill of exchange, the only evidence of his acceptance was the testimony of a bank clerk to the effect that, two years before, he saw a person of the defendant's name sign his name in a book; that he had never seen him since, but that he thought the handwriting was the same, and had since seen checks bearing the same signature. It was held that this evidence was admissible.³

"In a similar action against the alleged acceptor of a bill of exchange, it appeared that the bill had been sent by mail for acceptance, directed to 'Charles Banner Crawford, East India House,' and that it had been returned accepted, 'C. B. Crawford.' A witness testified that the signature to this acceptance was the signature of Charles Banner Crawford, who was formerly a clerk in the East India House, but the witness did not know whether that Mr. Crawford was the defendant. It was held that this was sufficient evidence of identity, at least in the absence of an affidavit to show that the defendant was not the same person.⁴

"Any person examining the directory of the city of St. Louis, will see that there are in this city many persons who possess the same christian and surname, but such circumstances have not operated to do away with the familiar rule, acted upon in this State, and so far as we know in all other jurisdictions, that identity of name is *prima facie* evidence of identity of person.⁵

"It was held in Massachusetts in a criminal trial that, for the purpose of proving that the defendant had made certain communications to persons in New York, evidence was admissible that

¹ Smith v. Henderson, 9 Mees. & W. 798, 801.

² Sewell v. Evans, 4 Ad. & El. (N. S.) 626.

³ Harrington v. Fry, 8 Scott, 384.

⁴ Greenshields v. Crawford, 9 Mees. & W. 314.

⁵ Flournoy v. Warden, 17 Mo. 435; Gitt v. Watson, 18 Mo. 274; State v. Moore, 61 Mo. 279.

certain telegraphic messages in his writing had been delivered to the operators of the telegraph company, other evidence being given to the effect that such messages were by the operators transmitted over the wires to the persons to whom they were addressed by the defendant. This decision was approved and applied by an eminent judge in a celebrated criminal trial.¹ It is but an extension of the familiar rule applicable to carriage by the post, under which evidence that a letter was deposited in the post-office properly directed, is admissible as tending to show that it was received by the person to whom it was addressed, provided that such person were living at the place to which it was directed, and usually received his letters there.²

"Upon a somewhat analogous principle it has often been held that in case of the death or absence from the country of a subscribing witness, it is competent to prove the genuineness of his signature, and that such proof will raise a presumption of the genuineness of the signature which the subscribing witness attested.³ And although the rule has not been universally accepted,⁴ it seems to be the law in this State.⁵

"But laying out of view these analogies, a decision of our Supreme Court is found so closely analogous to the case at bar that it may be treated as an authority which we should not be at liberty to disregard. The action was under the statute of this State, known as the 'Boat and Vessel Act,' for the non-performance of a contract alleged to have been made by the master of the defendant steamboat with the plaintiff by telegraph. Evidence was given tending to show that the plaintiff sent a dispatch to the defendant steamboat, which was delivered to her officers. The plaintiff then offered evidence tending to show that a dispatch purporting to come from the master of the steamboat in reply to his dispatch addressed to him, had been delivered for transmission in the telegraph office at the place where the boat was, and

¹ *United States v. Babcock*, 3 Dill. (U. S.) 571, 575, per Dillon, J.

² 1 Greenl. Ev. Sec. 40; *Dana v. Kemble*, 19 Pick. (Mass.) 112; *Briggs v. Hervey*, 130 Mass. 187; *Huntley v. Whittier*, 105 Mass. 391; *Bank v. McMonigle*, 60 Pa. St. 156; *Bussard v. Levering*, 6 Wheat. (U. S.) 102; *Lindenberger v. Beall*, 6 Wheat. (U. S.) 104.

³ *Adams v. Kerr*, 1 Bos. & Pul. 361; *Nelson v. Wittal*, 1 Barn. & Ald. 19; *Sluby v. Chaplin*, 4 Johns. 461.

⁴ *Robards v. Wolf*, 1 Dana (Ky.), 155.

⁵ *Little v. Chauvin*, 1 Mo. 626.

had been received by him, but without offering to prove that such dispatch had been in fact sent by the master of the defendant steamboat, or with his consent. It was held that this evidence was admissible. In giving the opinion of the court, Scott, J., said: 'It is not expected, when men contract by telegraph, that they are afterwards to be bound or not, as their passions or interest may dictate. Such contracts must be regarded as binding and obligatory as if made in the ordinary way. Private communications relative to business, made by means of a telegraph, are usually relied on, and that reliance has not proved unfounded. When men consent to use the telegraph for the purpose of making an agreement, there is no hardship in submitting to a jury, as evidence of their consent to such an agreement, those facts and circumstances which are received by and acted upon by mankind in communicating through that medium. Here, the defense does not turn on any imposition or forgery on the part of the agents of the telegraph; but the plaintiff, by the pleadings, is put to the proof of the contract on which he has sued. The evidence is ample to show that a communication was made by the plaintiff to the defendant; but the difficulty arises in showing that the answer to that communication was from the agent of the defendant. The telegraphic agent testifies that the dispatch received from the plaintiff was delivered to the officers of the steamboat Robert Campbell, and a dispatch in answer to that of the plaintiff was deposited in his office to be forwarded to the plaintiff, which was done on the next day. If, under such circumstances, any person had received a dispatch in answer to one forwarded by him, he would not have failed to act upon it. His conduct would have been based upon the faith usually given to the correctness and fidelity with which such business is transacted by the agents of the telegraph. For these reasons, we are inclined to the opinion that the evidence offered by the plaintiff was sufficient to permit the dispatch to be read to the jury, who would then, from all the circumstances, determine whether it was the act of the master of the boat.'¹

"The only decision to which we have been referred where the instrument of communication was a telephone, is that of the Court of Appeals of Kentucky, in the case of *Sullivan v. Kuykendall*.²

¹ *Taylor v. Steamboat Co.*, 20 Mo. 254, 260.

² 82 Ky. 483; s. c., 56 Am. Rep. 901.

In that case, A., desiring to communicate with B., applied to the telephone operator to call B. The operator thereupon held what purported to be a conversation with B., repeating the supposed communication of B. to A. as it came over the wire. It was held, in an action between A. and B., that A. might prove, by himself and others, what the operator had reported to him as coming from B., the operator himself having been called as a witness and not remembering the conversation.

"All these decisions proceed upon the principle that those evidentiary matters upon which men are compelled to act in the ordinary affairs of life and in the usual transactions of business ought to be allowed to go to the jury in cases where they become material to the issues on trial. The telephone, although a very recent invention, has come into such common use that, we think, as the learned judge of the circuit court is reported to have reasoned, that the courts may properly take judicial notice of the general manner and extent to which it is made use of by the business community. No doubt very many important business transactions are every day made by telephonic communications of precisely the same character as that which the witness was allowed to testify in this case. A person is called up by one desiring to communicate with him by means of a connection of their respective wires through what is known as the central office. A conversation ensues. It may be relative to the most important matters of business. It may involve a contract for the sale of bonds and stocks, instructions from a principal to his agent touching important transactions, or the acknowledgment of a debt due and a promise to pay the same. The use of this instrument facilitates business to such an extent that it would be very prejudicial to the interests of the business community, if the courts were to hold that business men are not entitled to act upon the faith of being able to give in evidence to juries replies which they receive to communications made by them to persons at their usual places of business in this way.

"The judgment of the circuit court will be affirmed. It is so ordered. All the judges concur."¹

§ 126. **Taxation of Telephone Companies.**—The principal corporation established to develop this great invention was organized under a special act of

¹ *Globe Printing Co. v. Stahl*, 23 Mo. App. 451-459.

the legislature of Massachusetts, "to incorporate the American Bell Telephone Company." It was held by the Supreme Court of the United States, in the Telephone Cases, already alluded to,¹ that the authority conferred by this special act authorized it to select its corporate name, and made the certificate provided by another statute² conclusive of its corporate existence. Thus organized, this company proceeded, as many companies organized to develop patented inventions now do, to establish sub-corporations, so to speak, in each of the States, which were to be its licensees, for the supposed reason that such a course would obviate sundry laws unfriendly to foreign corporations. To these sub-corporations it leases its instruments and licenses their use. The entire business of furnishing telephonic facilities to the public, which, in addition to the instruments, involves the maintenance of an extensive plant, consisting of wires, poles, etc., is carried on by these local bodies, who receive the compensation paid by the public, which constitutes the entire earnings arising from the use and employment of the company's instruments in the particular territory. The Bell Company receives from the local companies, as compensation for the use of its instruments at its office in Boston, a royalty payable monthly, in advance, without regard to whether the instruments are used or not. It has no office or officer, unless it be those of the local companies, and has no direct business relations with the public. In a case where these facts were developed, wherein the relations between the parent

¹ *Ante*, § 102.

² Mass. St. 1870, ch. 224, § 411.

corporation in Massachusetts and the subcorporations in New York were under consideration, it was held that the local companies were its *licensees*, and not its *agents*; and that it was not "doing business" in New York, within the meaning of a statute of that State,¹ taxing the gross earnings of telephone companies "doing business" in this State.² It appeared that the contracts, in addition, provide for the use of private lines, and require leases for the use of telephonic instruments to the patrons of such lines to be made in the name of the Bell Company; but it was stipulated that the provision was inserted in the contracts to prevent the illegitimate use of private lines by unauthorized persons, and to guard against infringements of the company's patents. It also appeared that the management and control of the entire business was confided to the local corporations, without any material distinction between the various classes, and that they collect the dues for the private lines, as in other cases, paying the Bell Company a royalty for the use of the instruments. In view of these facts, the court held that, even in respect of the private lines, the local corporations were not agents of the parent corporation.³

§ 127. **Taxation of Stock of Parent Corporation in Local Corporation.**—Upon the facts stated in the preceding section, the fact that the Bell Company was a stockholder in the local corporations did not render its local stock taxable in New York under a statute of that State,⁴ taxing the capital stock of all

¹ Laws N. Y. 1881, ch. 361, § 6.

² *People v. American Bell Telephone Co.*, 117 N. Y. 241; s. c., 22 N. E. Rep. 1057; s. c., 27 N. Y. State Rep. 459.

³ *Ibid.*

⁴ Laws N. Y. 1881, ch. 361, § 3.

corporations doing business in the State.¹ A similar view was taken of this question in Pennsylvania, the Supreme Court of that State holding that the fact that the Bell Company had an office within the State, and made contracts with the local corporations for the introduction and use of its apparatus within the State, by which contracts it reserved to itself the right to take possession of the instruments and use them, upon certain breaches of the contract by the local companies did not render the parent company liable to taxation upon its capital stock, under the Pennsylvania act of June 7, 1879, unless upon such breach of the contracts it should come into the State and use and operate the telephones itself.²

§ 128. **License Tax.**—Undoubtedly the State may impose a license tax upon a telephone company for the privilege of doing business within its limits, or may authorize a municipal corporation to impose such a tax for a like privilege within the town or city. But it has been held that where the State has imposed upon such a company an annual license fee in lieu of all taxes for any purpose, a municipal corporation cannot impose a general license fee.³ So, it has been held that, if a municipal corporation grants to a telephone company without charge, the privilege of erecting its poles along the public streets, it thereby disables itself from imposing a charge of five dollars per pole upon

¹ *People v. American Bell Tel. Co.*, 117 N. Y. 241; s. c., 22 N. E. Rep. 1057; s. c., 27 N. Y. State Rep. 459.

² *Com. v. American Bell Telephone Co.*, 129 Pa. St. 217; s. c., 46 Phila. Leg. Int. 342; 24 W. N. C. 187; 18 Atl. Rep. 122.

³ *Wisconsin Telephone Co. v. Oshkosh*, 62 Wis. 32.

the company.¹ But the soundness of this decision is not clear. Taxes are imposed for the purpose of supporting the government, and the power of taxation, so important to the public welfare, is never presumed to be surrendered by implication; and an ordinance granting a license to occupy the streets with such erections is entirely consistent with the assumption that the company will be subject to future taxation; and the laying of a tax at so much a pole seems to be merely a mode of graduating it so as to conform to the amount of property and the extent of the business.²

§ 129. **Privileged Taxation of Telegraph Companies.**—A statute of Indiana, drawn with the apparent purpose of meeting decisions of the Supreme Court of the United States already cited, provides that the "transmission of messages by telegraph for hire, from point to point within this State, by carriers by telegraph, * * * is hereby declared a *privilege*, for which such carriers shall pay to the State annually, a sum of money to be determined" as specified; and penalties for the violation of the act are prescribed.³

§ 130. **Statutory Schemes of Taxation.**—In many recent statutory schemes of taxation, telephone companies are specially named. In Arkansas they are grouped for taxation with a number of other corporations and taxed like others.⁴ In Alabama they are grouped for taxation with telegraph com-

¹ *City of New Orleans v. Great South. Telephone, etc. Co.*, 40 La. An. 41; s. c., 3 South. Rep. 533.

² See a learned article on this subject by Adelbert Hamilton, 27 Am. L. Reg. (N. S.) 426, n.

³ Ind. Act March 11, 1889; L. 1889, ch. 215, p. 389.

⁴ Ark. Dig. Stats. 1883, §§ 5645, 5656.

panies and a tax is laid on their gross receipts.¹ In Kentucky,² Minnesota,³ and Wisconsin,⁴ they are taxed separately from other corporations on their gross receipts. In Pennsylvania they are grouped for taxation with many other corporations and likewise taxed on their gross receipts.⁵ In New Hampshire they are taxed according to the value of their tangible property, and in proportion to the taxation of the other property through the State.⁶ In Texas there is a State *license tax* of fifty dollars in each county in which such a company does business, and a county license tax of ten dollars.⁷

¹ Ala. Code 1887, §§ 454, 504, 508.

² Gen. Stat. Ky. 1888, p. 1046, § 5.

Minn. Act March 3, 1887; 2 Gen. Stat. p. 217.

⁴ Laws Wis. 1883, ch. 345, §§ 1, 2; *Id.* 1885, p. 313.

⁵ Penn. Act June 1, 1889, § 23; Supt. to Revenue Act of 1889.

⁶ N. H. Laws 1883, ch. 1010.

⁷ Rev. Civ. Stats. Tex. 1888, Art. 4685.

CHAPTER VI.

GENERAL OBLIGATIONS OF TELEGRAPH COMPANIES.

SECTION.

136. Public Nature of their Employment.
137. Not Liable as Common Carriers.
138. Reasons for Distinguishing their Liability from that of Common Carriers.
139. Remote Analogy to the Undertaking of a Common Carrier.
140. Liable for What Degree of Care.
141. View that they are Liable for a High Degree of Diligence, Skill and Care.
142. Whether the Requisite Degree of Care was Employed is a Question for a Jury.
143. Bound to Transmit all Lawful Messages Tendered.
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146. Liable for Transmitting Forged Messages.
147. Illustration of the Foregoing.
148. Not Liable for Fraud Happening in Consequence of Negligence of their Agent.
149. Not Liable for Cashing Fictitious Money Order.
150. Liable for Transmitting Libelous Messages.
151. Bound to Transmit Messages as Written.
152. Not Liable for Mistake of their Agent in Correcting Erroneous Message.
153. Not Bound to Transmit Oral Messages.

§ 136. Public Nature of their Employment.—
In England the obligation of a telegraph company to its customers is regarded as resting merely in contract, and to be measured only by the agree-

ment made between the parties.¹ This rule, which enables a corporation engaged in a public employment to dictate to the scattered members of the community who must employ it, the terms upon which it will serve them, has not found favor in the American courts. In those courts it is regarded as a public institution. It serves a public purpose. The exercise of the right of eminent domain is a condition essentially precedent to its existence, and special laws are generally enacted for the preservation of its property and for the secrecy of business communications made over its lines.²

§ 137. **Not Liable as Common Carriers.**—By the principles of the common law, originating in what in England was called the *custom of the realm*, a common carrier is liable for the loss or damage of goods entrusted to him for carriage, happening through any other agency than the act of God or the public enemy. It is well known that the reason for im-

¹ *Playford v. United Kingdom Tel. Co.*, L. R. 4 Q. B. 706; *Dickson v. Reuter's Tel. Co.*, 3 C. P. Div. 1; s. c., 2 C. P. Div. 62.

² *Parks v. Alta California Tel. Co.*, 13 Cal. 422; *De Rutte v. New York, etc. Tel. Co.*, 30 How. Pr. 413; 1 *Daly* (N. Y.), 547; *Passmore v. Western Union Tel. Co.*, 78 Pa. St. 242; *Western Union Tel. Co. v. Carew*, 15 Mich. 525; s. c., 2 *Thomp. Neg.* 828; *Wann v. Western Union Tel. Co.*, 37 Mo. 481; *Western Union Tel. Co. v. Shotter*, 71 Ga. 760; *Western Union Tel. Co. v. Blanchard*, 68 *Id.* 299; s. c., 45 Am. Rep. 480; *Tyler v. Western Union Tel. Co.*, 60 Ill. 421; s. c., 14 Am. Rep. 38; *Sweetland v. Illinois, etc. Tel. Co.*, 27 Iowa, 433; s. c., *Allen Tel. Cas.* 471; *Bartlett v. Western Union Tel. Co.*, 62 Me. 209, 214; *Breese v. United States Tel. Co.*, 48 N. Y. 132; s. c., 8 Am. Rep. 526, per *Earl, C.*; *Allen Tel. Cas.* 663; *Telegraph Co. v. Griswold*, 37 Ohio St. 301; s. c., 41 Am. Rep. 500; *New York, etc. Tel. Co. v. Dryburg*, 35 Pa. St. 298; s. c., *Allen Tel. Cas.* 157; *Wolf v. Western Union Tel. Co.*, 62 Pa. St. 83; s. c., 1 Am. Rep. 387; *Western Union Tel. Co. v. Neill*, 57 Tex. 283; s. c., 44 Am. Rep. 589; *Candee v. Western Union Tel. Co.*, 34 Wis. 471; s. c., 17 Am. Rep. 452; *Abraham v. Western Union Tel. Co.*, 6 West Coast Rep. 163; s. c., 11 *Sawyer* (U. S.) 28.

posing this stringent liability upon a common carrier was to protect the public against thefts and other misprisions of the carrier's servants. The same reasons do not apply in the case of a telegraph company; for, in a strict sense, there is nothing to steal; nor is there a strict analogy between the transmission of news by electricity and the carriage of goods. In telegraphy no ponderable substance is transmitted. The telegraph company merely undertakes to perform a service for the sender of the message. This he is obliged to perform through the agency of servants more or less skillful; of instruments more or less perfect; by the use of a subtle fluid or force, the nature of which is still unknown to science, which is liable to work imperfectly in consequence of induction, atmospheric disturbance, and a variety of physical causes not entirely within human control. Such being the nature of the employment, the courts have finally united in the view that a telegraph company is not liable as an insurer against all accidents not the result of the act of God or of the public enemy, as is a common carrier.¹

¹ *Tyler v. Western Union Tel. Co.*, 60 Ill. 421; s. c., 14 Am. Rep. 38; *Birney v. New York, etc. Tel. Co.*, 18 Md. 341; s. c., Allen Tel. Cas. 195; *Ellis v. American Tel. Co.*, 13 Allen (Mass.), 226; s. c., Allen Tel. Cas. 306; *Grinnell v. Western Union Tel. Co.*, 113 Mass. 299; s. c., 18 Am. Rep. 485; *Western Union Tel. Co. v. Carew*, 15 Mich. 525; s. c., Allen Tel. Cas. 345; s. c., 2 Thomp. Neg. 828; *Leonard v. New York, etc. Tel. Co.*, 41 N. Y. 544; s. c., 1 Am. Rep. 446; s. c., Allen Tel. Cas. 500; *Breese v. United States Tel. Co.*, 48 N. Y. 132; s. c., 8 Am. Rep. 526; Allen Tel. Cas. 663; *Schwartz v. Atlantic, etc. Tel. Co.*, 18 Hun (N. Y.), 157; *De Rutte v. New York, etc. Tel. Co.*, 1 Daly (N. Y.), 547; s. c., 30 How. Pr. 403; *Telegraph Co. v. Griswold*, 37 Ohio St. 301; s. c., 41 Am. Rep. 500; *New York, etc. Tel. Co. v. Dryburg*, 35 Pa. St. 298; s. c., Allen Tel. Cas. 157; *Pinckney v. Western Union Tel. Co.*, 19 S. C. 71; *Abraham v. Western Union Tel. Co.*, 6 West Coast Rep. 162; *Baxter v. Dominion Tel. Co.*, 37 Up. Can. Q. B. 470; *Baldwin v. United*

§ 138. **Reasons for Distinguishing Their Liability from That of a Common Carrier.**—The reasons for distinguishing the two employments have been frequently and forcibly stated, but nowhere with greater clearness than in the opinion of JOHNSON, J., in *Breese v. United States Telegraph Company*,¹ as follows: "I cannot refrain from observing here, that the business in which the defendant is engaged, of transmitting ideas only from one point to another, by means of electricity operating upon an extended and insulated wire, and giving them expression at the remote point of delivery by certain mechanical sounds, or by marks or signs indented, which represent words or single letters of the alphabet, is so radically and essentially different, not

States Tel. Co., 45 N. Y. 744; s. c., 54 Barb. (N. Y.) 505; 6 Abb. Pr. (N. S.) 405; 1 Lans. (N. Y.) 125; *Passmore v. Western Union Tel. Co.*, 78 Pa. St. 238; *Wann v. Western Union Tel. Co.*, 37 Mo. 472; *Washington, etc. Tel. Co. v. Hobson*, 15 Gratt. (Va.) 122; *Bartlett v. Western Union Tel. Co.*, 62 Me. 209; *Western Union Tel. Co. v. Fontaine*, 58 Ga. 433; *Camp v. Western Union Tel. Co.*, 1 Metc. (Ky.) 164; *Bryant v. American Tel. Co.*, 1 Daly (N. Y.), 575, 584; *Alken v. Telegraph Co.*, 5 S. C. 358; *Dickson v. Reuter's Tel. Co.*, 3 C. P. Div. 1, 7; s. c., 2 C. P. Div. 62; *Fowler v. Western Union Tel. Co.*, 80 Me. 381; s. c., 6 Am. Rep. 211, 214, opinion by Foster, J.; *Little Rock, etc. Tel. Co. v. Davis*, 41 Ark. 79; *Western Union Tel. Co. v. Munford*, 87 Tenn. 190; s. c., 10 Am. St. Rep. 630; *Abraham v. Western Union Tel. Co.*, 23 Fed. Rep. 315. It was held in California, in 1859, that telegraph companies are common carriers and subject to the severe rule of liability of such carriers. *Parks v. Alta California Tel. Co.*, 13 Cal. 422. But in 1874 this rule was changed in that State by the adoption of the civil code (Civ. Code Cal. § 2168), which provides that such companies are not common carriers, but "must use great care and diligence in the transmission and delivery of messages." A corporation which, though organized under the N. Y. Stat. of 1848, "for the incorporation and regulation of telegraph companies," has in its service messengers to *deliver parcels* for those who may so employ it, is liable for a loss occasioned by the delivery, by its messenger, of a parcel contrary to the instructions of the sender. *Felber v. Manhattan Dist. Tel. Co.*, 3 N. Y. Supp. 116; s. c., 22 Abb. N. C. (N. Y.) 121. See also *ante*, § 103.

¹ 45 Barb. (N. Y.) 274, 292; s. c., 31 How. Pr. (N. Y.) 86.

only in its nature and character, but in all its methods and agencies, from the business of transporting merchandise and material substances from place to place by common carriers, that the peculiar and stringent rules by which the latter are controlled and regulated, can have very little just and proper application to the former. And all attempts heretofore made by courts to subject the two kinds of business to the same legal rules and liabilities, will, in my judgment, sooner or later, have to be abandoned as clumsy and indiscriminating efforts and contrivances to assimilate things which have no natural relation or affinity whatever, and, at best, but a loose and mere fanciful resemblance. The bearer of written or printed documents and messages from one to another, if such was his business or employment, might very properly be called and held a common carrier; while it would obviously be little short of an absurdity to give that designation or character to the bearer of mere verbal messages, delivered to him by mere signs of speech, to be communicated in like manner. The former would have something which is, or might be the subject of property, capable of being lost, stolen, and wrongfully appropriated; while the latter would have nothing in the nature of property which could be converted or destroyed, or form the subject of larceny, or of tortious caption and appropriation, even by the 'king's enemies.' " More briefly stated by another judge, a telegraph company is not held to the liability of a common carrier, because the transmission of messages is necessarily subject to the risk of mistake and interruption: "The wire is exposed to the interference of strangers; a sur-

charge of electricity in the atmosphere, or a failure of or irregularity in the electrical current, may stop communication; and it is continually subject to danger from accident, malice and climatic influence; while the company has not the actual, immediate custody of the message, as the common carrier has of the merchandise it carries."¹

§ 139. *Remote Analogy to the Undertaking of a Common Carrier.*—Some courts have found an *analogy* between the undertaking of a telegraph company and that of a common carrier.² But it has been well said that the analogy is not perfect,³ and it has been denied in an English case that there is any analogy.⁴ But the discussion is meaningless; for all the decisions unite on the proposition that a telegraph company *is not liable as an insurer*, but only by reason of *negligence or willful default* in the performance of the duty which it undertakes.

§ 140. *Liable for What Degree of Care.*—The degree of care which telegraph companies are bound to bestow upon the performance of their duties is variously stated. It is sometimes said that they ought to use "a high, perhaps the very highest degree of care and diligence in their operation,"⁵

¹ *Smith v. Western Union Tel. Co.*, 83 Ky. 104; s. c., 4 Am. St. Rep. 126, 130, opinion by Holt, J.; citing *Western Union Tel. Co. v. Blanchard*, 68 Ga. 299; s. c., 45 Am. Rep. 480.

² *Western Union Tel. Co. v. Hope*, 11 Bradw. (Ill.) 289; *True v. International Tel. Co.*, 60 Me. 9; s. c., 11 Am. Rep. 166; *Telegraph Co. v. Griswold*, 37 Ohio St. 301; s. c. 41 Am. Rep. 500. See also *Manville v. Western Union Tel. Co.*, 37 Iowa, 214; s. c., 18 Am. Rep. 8; *Tyler v. Western Union Tel. Co.*, 60 Ill. 421, 427.

³ *Aiken v. Telegraph Co.*, 5 S. C. 358.

⁴ *Playford v. United Kingdom, etc. Tel. Co.*, L. R. 4 Q. B. 714, per Lush, J.

⁵ *Western Union Tel. Co. v. Carew*, 15 Mich. 525; *Tyler v. Western Union Tel. Co.*, 60 Ill. 428, 434.

or "exact diligence."¹ Other courts are satisfied with "ordinary care and vigilance,"² or "due and reasonable care," as stated by BIGELOW, J., in an important case.³ Perhaps there is little, if any difference in these terms as applied to cases under discussion. They all undoubtedly mean that these corporations shall use a degree of care proportionate to the hazards and possibilities of mistake in their business.⁴ As the transmission of dispatches is a most delicate operation in many particulars, ordinary diligence in the operation and management of telegraph lines would demand a degree of attention from the agents of the companies fairly denominated extraordinary when applied to other concerns of life.

§ 141. **View that They are Liable for a High Degree of Diligence, Skill and Care.**—"The degree of care," it has been reasoned, "which these companies are bound to use, is to be measured with reference to the kind of business in which they are engaged. As compared with many other kinds of business, the care required of them might be called 'great care.' While meaning really the same, it is variously stated by different courts in the decisions to which we have referred: 'due and reasonable care,' 'ordinary care and vigilance,' 'reasonable and proper care,' 'a reasonable degree of care and diligence,' 'care and diligence adequate to the business which

¹ *Passmore v. Western Union Tel. Co.*, 78 Pa. St. 242.

² *Baldwin v. United States Tel. Co.*, 45 N. Y. 744, 751.

³ *Ellis v. American Tel. Co.*, 13 Allen (Mass.), 226.

⁴ *Western Union Tel. Co. v. Edsall*, 63 Tex. 668; *Womack v. Western Union Tel. Co.*, 58 Tex. 176; *Western Union Tel. Co. v. Broesche*, 72 Tex. 654; s. c., 10 S. W. Rep. 734; *Gulf, etc. R. Co. v. Wilson*, 69 Tex. 739; s. c., 7 S. W. Rep. 653; *Beasley v. Western Union Tel. Co.*, 39 Fed. Rep. 181.

they undertake;' 'with skill, with care, and with attention;' 'a high degree of responsibility.' These are but the varied forms of expressing the requirement of what is known in law as ordinary care, as applied to an employment of this nature, an employment which is not that of an ordinary bailee. The public, as a general rule, have no choice in the selection of the company. They have none in the selection of its servants or agents. They have no control over the agencies or instrumentalities used in conducting the business of the company. The public must take the agencies which the company furnishes, and they have no supervision over its management or methods of performing the service which it holds itself out as willing and ready to perform. And while we do not hold that these companies are common carriers, and subject to the same severe rule of responsibility, we think that those who engage in the business of thus serving the public by transmitting messages should be held to a high degree of diligence, skill and care, and should be responsible for any negligence or unfaithfulness in the performance of their duties.'" It is also stated that "a telegraph company which holds itself out to the public as ready to transmit all messages delivered to it, is bound to have suitable instruments and competent servants, and to see that the service is rendered with that degree of care and skill which the peculiar nature of the undertaking requires." But it is also said that this duty would not impose a liability upon the company for want of skill or knowledge, not reasonably attainable in

¹ *Fowler v. Western Union Tel. Co.*, 80 Me. 381; s. c., 6 Am. St. Rep. 211, 215, per Foster, J.

the art, nor for errors or imperfections which arise from causes not within its control, or which are not capable of being guarded against.¹

§ 142. **Whether the Requisite Degree of Care was Employed is a Question for a Jury.**—As in other actions for damages grounded on the negligent failure of the defendant to perform a duty voluntarily assumed by contract or cast upon him by operation of law, the question whether he has exercised the care required of him in the given case will be a question for a jury, except in cases where the evidence is so clear and unequivocal that fair-minded men could not entertain a doubt upon it, in which case it will be a question of law for the court.² An *instruction* that “the question of diligence is one to be determined by the jury from all the facts and circumstances; and if you believe from the evidence that defendant used such care and diligence as a prudent man, under like circumstances, would use in his own behalf to deliver the message, and failed through no fault of defendant company or its agents or employees, then you will find for defendant,” has been held sufficient on the question of negligence.³

§ 143. **Bound to Transmit all Lawful Messages Tendered.**—Telegraph companies are the servants of the public, and are bound to act whenever called upon, their charges being paid or tendered. They are in that respect like common carriers, the law imposing on them a duty which they are bound to discharge. The extent of their liability is to transmit correctly

¹ *Fowler v. Western Union Tel. Co.*, 80 Me. 381; s. c., 6 Am. St. Rep. 211, 215, per Foster, J.

² 2 Thomp. Neg. 1235 *et seq.*; 2 Thomp. Tr., §§ 1663, 1665.

³ *Gulf, etc. R. Co. v. Wilson*, 69 Tex. 739; s. c., 7 S. W. Rep. 653. (*sub nom.* *Gulf, etc. R. Co. v. Miller.*)

the message as delivered.¹ They cannot avoid liability on the ground that compensation was not paid at the time the message was delivered by the sender, if the agent declined to receive the compensation at that time, and requested that the person to whom the message was sent be allowed to pay.²

§ 144. **And Under Reasonable Regulations.**—It has been reasoned that such companies, by accepting the benefits of the law authorizing the condemnation of land for the erection of their lines and buildings, place themselves under an obligation to the public to permit the use of their lines by all persons, under reasonable regulations; and that this obligation need not be created by statute, but rests upon them as an implication of law.³

§ 145. **Not Bound to Transmit Messages in Furtherance of Unlawful Undertakings.**—It has been held, however, that such a company is not bound to transmit a message, the design of which is to furnish the means of carrying on an unlawful business, and that this is so, regardless of the motive which actuated the agents of the company in refusing to transmit it. Accordingly, *an injunction* was denied to compel a telegraph company to furnish the keeper of a "bucket shop" with stock quotations.⁴

§ 146. **Liable for Transmitting Forged Messages.**—If a telegraph company receives and transmits, through negligence or willfulness, a dispatch forged in the name of a person other than the sender, it

¹ Western Union Tel. Co. v. Dubois, 128 Ill. 248.

² Western Union Tel. Co. v. Yopst, 118 Ind. 248; s. c., 20 N. E. Rep. 222.

³ State, etc. Turnpike Co. v. American, etc. News Co., 43 N. J. L. 381.

⁴ Smith v. Western Union Tel. Co., 84 Ky. 664; s. c., 2 S. W. Rep. 483.

becomes liable to the person to whom the message is sent for the proximate damages thereby sustained.¹ Where the agent of a telegraph company, at one of its stations, had power to *delegate his authority*, and employed another person to transmit and receive messages in his place, and such person sent a false message, purporting to come from the cashier of a bank, directing another bank to pay to a fictitious person a sum of money, and the sender then personated the fictitious person and obtained the money, without any negligence on the part of the paying bank, it was held that the telegraph company was responsible to the bank for the loss.² Where the agent of a telegraph company, who was also *agent of an express company*, sent a forged dispatch to a merchant requesting him to forward money to his correspondent to purchase grain, and the telegram was received and in the usual course of business complied with, and the money was intercepted and converted to his own use by the agent, the telegraph company was held liable, although an action might also have been maintained against the express company.³ In like manner, the fact that the person thus defrauded into the payment of a forged draft has a remedy *ex contractu* against a solvent indorser, is not a bar to an action *ex delicto* against

¹ *Strause v. Western Union Tel. Co.*, 8 Biss. (U. S.) 104; *Elwood v. Western Union Tel. Co.*, 45 N. Y. 549; s. c., 6 Am. Rep. 140.

² *Bank v. Western Union Tel. Co.*, 52 Cal. 280. For the purpose of the decision the court assumed that an agent of a telegraph company has no authority to appoint a sub-agent to perform his duties in sending and receiving dispatches.

³ *McCord v. Western Union Tel. Co.*, 39 Minn. 181; s. c., 39 N. W. Rep. 315; 1 L. R. A. 143; 25 Am. & Eng. Corp. Cas. 578.

the telegraph company, and it is not necessary to sue the indorser first.¹

§ 147. **Illustration of the Foregoing.**—This is well illustrated by a case where the plaintiffs were bankers doing business at Pithole in Pennsylvania. They received from the Western Union Telegraph Company the following message, purporting to come from Erie: "Keystone Bank will pay the check of T. F. McCarthy to the amount of \$20,000. J. J. Towne, Cashier Keystone Bank." The fact was that the message had been presented to the operator at Erie by McCarthy himself. The operator knew McCarthy by that name. He showed no authority from the cashier to transmit the message, and the operator did not require proof of his authority. McCarthy went forward to Pithole and presented himself at the bank in time to draw from the bank \$10,000 on the faith of this telegram. He obligingly left the other \$10,000 to his credit in the bank. The message turned out to be fraudulent. The bankers brought an action against the telegraph company for damages, and recovered the \$10,000 which they had thus paid, with interest. It was held that the operator at Erie had been guilty of gross negligence in sending a telegram of this importance without proof of its authenticity, and the judgment was accordingly affirmed.²

§ 148. **Not Liable for Fraud Happening in Consequence of Negligence of Their Agent.**—A telegraph company is not, however, liable for the *fraud* of a third person, where the opportunity to commit the

¹ *Strause v. Western Union Tel. Co.*, 8 Biss. (U. S.) 104.

² *Elwood v. Western Union Tel. Co.*, 45 N. Y. 549; s. c., 6 Am. Rep. 140.

fraud arises out of the *negligence* of the agent of the company in transmitting the dispatch. The reason is that, in such a case, the damage is not a *probable*, and hence a *proximate* consequence of the negligence, but is too remote. Thus, A. went to the office of a telegraph company and sent a dispatch to the plaintiff asking for \$500. By the negligence of the defendant's servants, the message was changed so as to read \$5,000. The plaintiff sent this sum to A., and the sum was so large that it tempted A.'s cupidity to such an extent that he ran away with it. It was held that the defendant was not liable for the loss of the money, for the reason that its negligence was not the proximate cause of it.¹ The court proceeded upon the well known doctrine in the law of damages, that where the plaintiff sets on foot a train of causes which might or might not lead to an injury, but the injury is actually produced by the wrongful intervention of a third person, which intervention was not the natural consequence of the original setting on foot of the train of causes, the person originally starting such train of causes is not liable. The intervention of the third person breaks the train of causation, so to speak.²

¹ Lowery v. Western Union Tel. Co., 60 N. Y. 198; s. c., 19 Am. Rep. 154.

² Cases illustrating this principle are: Crain v. Petrie, 6 Hill (N. Y.), 522; Vicars v. Wilcox, 8 East, 1; Knight v. Gibbs, 1 Ad. & El. 43; Carter v. Towne, 103 Mass. 507; Davidson v. Nichols, 11 Allen (Mass.), 514; Park v. Cohoes, 10 Hun (N. Y.), 531; Griggs v. Fleckenstein, 14 Minn. 81; Harrison v. Collins, 86 Pa. St. 153; Proctor v. Jennings, 6 Nev. 83; Jenks v. Wilbraham, 11 Gray (Mass.), 142; Tutein v. Hurley, 98 Mass. 211; 2 Thomp. Neg. p. 1089. But see Pasten v. Adams, 49 Cal. 87; Powell v. Devenney, 3 Cush. (Mass.) 300. The test by which to determine the liability of the defendant is, to consider whether the act of the intermediate wrong-doer was of such a nature that it was likely to flow, and hence to be anticipated, from the original negligence or

§ 149. **Not Liable for Cashing a Fictitious Money Order.**—An impostor at Cincinnati sent a dispatch, in the name of B., over the Western Union Telegraph Company's line to C., at Selma, in Alabama, requesting C. to send a telegraphic money order to B. at Cincinnati. C. complied with the request, and sent a telegraphic money order over the same line to B., and took from the company the following receipt: "Received from C. \$40, to be paid to B. at Cincinnati, O." The telegraph company, on the same day, handed the money over to the impostor, who sent the dispatch, personating B. The impostor was not known to the company's agent, or identified as the person whom he had personated. In an action by C. against the telegraph company, to recover the money which he had thus lost, it was held that the defendant was not liable, there being no circumstances to create suspicion of the fraud in the minds of its agents.'

wrong of the defendant. If it was, then the defendant is liable, otherwise not. This is well illustrated by the Squib Case, 2 W. Black. 892, where the squib was wrongfully thrown in the market place, and, falling against a by-stander, was thrown by the latter from him to avoid its injurious effects. Here it was held that such an act, on the part of the person against whom the squib first fell, was to be anticipated by the person originally throwing it, and hence he was liable to the person hurt. It is also well illustrated by the Negro Boy Case, 4 Denio (N. Y.), 364, where a negro boy, in trying to escape from the angry pursuit of the defendant, knocked the faucet out of a cask of wine. Here, on the principle that the defendant had set in motion the force which caused the loss, it was held that he was liable, although it is not quite easy to see that he should have anticipated such a catastrophe as likely to follow from what he did.

¹ Western Union Tel. Co. v. Meyer, 61 Ala. 158; s. c., 32 Am. Rep. 1. This decision is clearly wrong. When a telegraph company engages in the business of banking it ought to be held to the same rules which are imposed upon bankers, common carriers and other bailees. One of those rules is that the banker is bound to know its customer, and is absolutely liable for the payment of money to a person not entitled to re-

§ 150. **Liable for Transmitting Libelous Messages.**—A Canadian court has held that the communication by a telegraph company, to the *associated press*, of a message which is libelous on its face, given it for transmission, is a *publication* which makes the company liable, especially where it refuses to disclose the name of the sender.¹

§ 151. **Bound to Transmit Messages as Written.**—In a leading case it has been ruled that telegraph companies, like printers, must “follow copy,” and that they do not exonerate themselves from liability for mistakes where they assume to deviate from copy, even to translate abbreviations. Thus, where a message, as delivered to a telegraph company, directed the party to whom it was addressed to send “two hand bouquets,” and the message as received

ceive it. It seems probable from its language that the above opinion was originally written upon this theory, but that the judge who wrote it was overborne by his associates in the consultation room. Manning, J., in the course of his reasoning, correctly says: “By engaging in the business of transferring money by telegraph, between persons at a distance from each other, for which it charged large commissions, it took upon itself the responsibility of doing the service correctly, and, like a banker, who by mistake pays a draft to some one who falsely personates the payee, or a carrier for hire who delivers goods to one not the consignee, must make good the amount so lost. And if the company is not held to the duty of taking pains to ascertain the identity of the person to whom the money transferred by telegraphic orders is to be paid, nothing would be easier than to use the telegraph as an instrument for committing frauds.” This was well said, and the conclusion irresistibly followed it that the company was liable; but at this point the opinion broke down and the learned judge continued: “My brothers think that where there is nothing to create suspicion in the minds of the company’s agents, it is for the party on whom the demand is made to ascertain for himself whether he who makes it is the person he professes to be, and that the company has no right to refuse payment of the money to him in reply to whose message the order to pay is sent. I was strongly inclined to the other conclusion. But the case is a new one, and I defer to their opinion.”

¹ *Armchambault v. Great N. W. Tel. Co.* (Quebec Court App.), 1888, 11 Montr. Leg. News 368; s. c., 14 Queb. L. R. 8.

read "two hundred bouquets," and, in an action against the company, it undertook to justify by proving that the word "hand" in the original message was written "hund," it was held that this was no justification,—WOODWARD, J. saying: The telegraph company did not send Leroy's message as he wrote it. If written as the company's agent read it, the word 'hand' was written 'hund;' and if the company had sent the word 'hund' to Dryburg, they would have been in no fault. Their agent, however, assumed that hundred was meant, and accordingly added the three letters 'red,' which did all the mischief. We do not understand that there was any dot after the letters 'hund' to indicate a contraction; so that the agent's inference that the word 'hundred' was the word meant was entirely gratuitous. The wrong, then, of which plaintiff complains, consisted in sending him a different message from that which they had contracted with Leroy to send. That it was wrong, is as certain as that it was their duty to transmit the message for which they were paid. Though telegraph companies are not, like common carriers, insurers for the safe delivery of what is entrusted to them, their obligations, as far as they reach, spring from the same sources—the public nature of their employment, and the contract under which the particular duty is assumed. One of the plainest of their obligations is to transmit the very message prescribed. To 'follow copy,' an imperative law of the printing office, is equally applicable to the telegraph office. * * *

The company claimed that their operator was a skillful and careful one. Then his negligence in this instance was the more apparent and inexcusable. If

the handwriting was so bad that he could not read it correctly, he should not have undertaken to transmit it; but, the business of transmission assumed, it was plainly his duty to send what was written. It was no affair of his that the message would have been insensible. Messages are often sent along the wires that are unintelligible to the operator. When he presumed to translate the handwriting and to add letters which confessedly were not in it, he made the company responsible to Dryburg for the damages that resulted from his wrong-doing."¹

§ 152. **Not Liable for Mistake of Their Agent in Correcting Erroneous Message.**—In line with the rule of the preceding paragraph, it has been held by the Commission of Appeals of Texas, that where the message, as delivered for transmission to the agent of the telegraph company, is, on being read over by him to the sender, discovered by the sender to be erroneous, and thereupon the agent assumes to correct it at the request of the sender, and makes a mistake in correcting it, so that it is transmitted as originally written, the company is not liable for damages arising from the mistake, or from the failure to transmit it as intended to be corrected. The case was that the plaintiff carried to the defendant's telegraph office a message written by himself in these words: "Can put stock on cars fourteen hands up twenty and half dollars two cars good sheep waiting." The receiving clerk read the message over aloud, and the plaintiff discovered that there was a mistake in it. The words "twenty and half" should have been "twenty-two and half."

¹ New York, etc. Tel. Co. v. Dryburg, 35 Pa. St. 298; s. c., 78 Am. Dec. 338.

The clerk undertook to correct the mistake by interlining the proper words. But he also made a mistake and put the interlineation in the wrong place, so that the dispatch when corrected read thus: "Can put stock on cars fourteen hands up twenty and half dollars two cars good two sheep waiting." The message was in fact delivered to the person to whom it was addressed exactly as the plaintiff had originally written it, the interlineation which the clerk had attempted to make having been from some cause omitted. The plaintiff did not read over the message, or hear it read after it had been corrected by the clerk. The clerk, in his testimony, claimed to have made the correction at the request of the plaintiff; but the plaintiff testified that the clerk offered to make the correction, and was permitted to do so by him. It further appeared from the evidence that it was not only not the duty of the receiving clerk to alter messages which were brought into the office, but that he was not permitted to do so. His duties were simply to receive the message, count the words, receive the money, and convey the message to the operator. On this state of facts the court held that the plaintiff could not recover; reasoning that, in assuming to correct the message for the plaintiff, the clerk was not acting within the scope of the employment of his master, the telegraph company, and that it accordingly made no difference whether he acted *sua sponte*, or at the request of the plaintiff.¹

§ 153. **Not Bound to Transmit Oral Messages.**—In the absence of evidence of any custom of a telegraph

¹ *Western Union Tel. Co. v. Foster*, 64 Tex. 220; s. c., 53 Am. Rep. 754.

company to receive messages orally delivered for transmission, a failure to transmit such a message is not a ground for recovering damages against the company.¹ Accordingly it was held that the plaintiff could not recover damages against a telegraph company for the failure of its operator to transmit a message to him informing him that he, the operator, had been unsuccessful in a search for a doctor which he had made at the plaintiff's request,—no such message having been charged or paid for.²

¹ *Western Union Tel. Co. v. Dozier*, 62 Miss. 268; s. c., 7 South. Rep. 325.

² *Ibid.*

CHAPTER VII.

STATUTORY PENALTIES AGAINST TELEGRAPH COMPANIES.

SECTION.

157. General Obligation to Transmit Messages in the Order in Which They are Received.
158. Statutes Enforcing this Obligation.
159. Indiana Statute Giving Penalty for Bad Faith, Partiality, or Discrimination.
160. Missouri Statute Giving a Penalty.
161. Not Liquidated Damages, but a Penalty.
162. Jury how Instructed as to Statutory Obligation to Transmit Messages in the Order in Which they are Received.
163. Arkansas Statute Giving Penalty.
164. How far Statutes Apply to Interstate Messages.
165. Validity of Statute Imposing a Penalty where Dispatch is Sent to Another State.
166. No Action for Penalty for Non-Delivery of Message Delivered to be Sent on Sunday.
167. Exception where the Dispatch Relates to a Work of Necessity.
168. Burden of Proof as to Necessity.
169. Exception in Cases of Necessity or Charity.
170. The Necessity may be a Moral or Social Necessity.
171. The Necessity may be Created by Negligence.
172. Retention of the Money not a Ratification by the Telegraph Company.
173. No Penalty for Refusing to Transmit Obscene Messages.
174. Penalty for Refusing Dispatches of Competing Lines.
175. When Notice to the Company Necessary.
176. When Payment of Actual Damages no Bar to Recovery of Penalty.
177. Action for Penalty by Addressee.
178. Jurisdiction of Such Actions: Justices of the Peace.

§ 157. **General Obligation to Transmit Messages in the Order in Which They are Received.**—The public duty of a telegraph company is such that it is under the general obligation of transmitting any message delivered to it for that purpose, on the payment or tender of the usual charges, with reasonable diligence, and in the order of time, with reference to other messages, in which it was delivered to it.¹

§ 158. **Statutes Enforcing this Obligation.**—The legislatures of many of the States, with the view of setting this question at rest, have enacted statutes making it the duty of the agents of such companies, under penalties, to receive dispatches from and for other telegraph companies, and from and for any person, and, on payment of the usual charges, to transmit them faithfully, without unreasonable delay, and (with certain exceptions) in the order in which they are received.² Of a statute of this char-

¹ *MacKay v. Western Union Tel. Co.*, 16 Nev. 222.

² Ark. Dig. Stat., Sec. 6419; Penal Code Cal., Sec. 638; Civil Code Cal., Secs. 2207, 2208; Gen. Stat. Conn. 1888, Sec. 3052; Rev. Stat. Ill. 1886, ch. 134, Secs. 6, 7; Rev. Stat. Ind. 1888, Sec. 4176, 4192a; McClain's Code Iowa, Sec. 2106; Gen. Stat. Ky. 1887, p. 431, Sec. 10; Rev. Stat. La. 1876, Sec. 3761; Md. Code 1878, p. 343, Sec. 136; Rev. Stat. Mo. 1889, Sec. 2725; Rev. Stat. Me. 1883, ch. 53, Sec. 1; Pub. Stat. Mass., ch. 109, Sec. 10; Comp. Laws Mich. 1882, Secs. 3706, 3707; Gen. Stat. Nev. 1886, Sec. 941; Rev. Stat. N. J. 1877, p. 1176, Sec. 12; 3 Rev. Stat. N. Y. (8th Ed.) p. 2062, 2065; 1 Rev. Stat. Ohio (1890), Secs. 3462, 3465; 2 Hill's Ann. Laws Oreg. 1887, Sec. 4176; 2 Bright Purd. Pa. Dig. 1629, Sec. 11; Code Va. 1887, Secs. 1291, 1292; 1 Thomp. & Steg. Tenn. Stat., Secs. 1322, 1324; Rev. Stat. Wis. 1878, Sec. 4557. By a recent statute in Connecticut, unjust discrimination by telegraph or telephone companies, in respect to furnishing telegraph or telephone service, etc., is prohibited. Pub. Acts Conn. 1889, ch. 160, p. 87. A recent statute of Georgia (Ga. Act Nov. 12, 1889; Acts 1888-89, p. 175), applies only to such telegraph companies as construct their lines after the passage of the act, and does not repeal Ga. Act Oct. 22, 1887 (Ga. Acts 1886-87, p. 111), prescribing penalties for violations of its provisions as to sending messages. *Western Union Tel. Co. v. Cooledge* (Ga.), 12 S. E. Rep. 264. The statute of Colorado (Colo. Stat. Act April 4, 1887; Laws 1887,

acter, BIGELOW, C. J., said, in a leading case: ' "The leading feature in this enactment is, that it in effect takes the business of conducting and managing a line of electric telegraph, within this commonwealth, out of the class of ordinary private occupations, and makes it a quasi-public employment, to be carried on with a view to the general benefit and for the accommodation of the community, and not merely for private emolument and advantage. Under this provision, an owner or manager of such a line becomes, to a certain extent, a public servant or agent." With such a statute in view, it was also said in a case in Virginia by Mr. Justice LACY: "It cannot, however, be claimed that the obligation of a telegraph company to send a message grows entirely out of the contract with the sender in Virginia; in this State the obligation rests upon them for the accurate transmission and faithful delivery of messages under the statute, as we have seen, as it does upon innkeepers, common carriers, and the like, upon whom legal duties rest, resulting

p. 345), "to prevent discrimination in the sale or delivery of news items," etc., has been repealed. Colo. Act March 30, 1889; Laws 1889, p. 271. There are statutes of the same kind as those here considered in Great Britain. Stat. 7 & 8 Vict., ch. 85, Sec. 13, requires railway companies to allow the use of electric telegraphs established on their lines for the service of the government, and by section 14 they are to be open to the public. Stat. 26 & 27 Vict., ch. 112, amended by 29 & 30 Vict., ch. 3, regulates the exercise of powers under special acts for the construction and maintenance of telegraphs. A party collected messages for a telegraph company, and received a commission from the company on the messages collected. It was held that the commission could not be considered as a violation of a provision in the charter of the company "for the sending and receiving of messages by all persons alike without favor or preference, and subject to such equitable charges and reasonable regulations as may from time to time be made by the company." *Reuter v. Electric Telegraph Co.*, 6 El. & Bl. 341; s. c., 2 Jur. (N. S.) 1245; 26 L. J. (Q. B.) 46.

¹ *Ellis v. American Tel. Co.*, 13 Allen (Mass.), 226, 231.

from their occupation and profession, and who owe a duty to the public irrespective of their engagements in particular instances. * * * In Virginia a telegraph company cannot refuse to make the contract with the sender without violating a penal statute of this State; and if they are under obligations, which they cannot avoid, to send every dispatch which is offered, how can their obligation be said to rest upon the contract alone? Their obligations, under the law of this State, are such that they are compelled to make the contract, and when it is made by receiving the message and the price for its transmission, according to their own regulations, they are under obligations to send it, both under their contract to send it and under the law which makes it their duty to send it.”¹

§ 159. **Indiana Statute Giving Penalty for Bad Faith, Partiality or Discrimination.**—A statute of Indiana, enacted in the year 1885, prescribes certain duties of telegraph companies, prohibits discrimination in the transmission of messages, and imposes a penalty for the violation of its provisions, in the following language: “Every telegraph company with a line of wires wholly or partly within this State, and engaged in doing a general telegraphic business, shall, during the usual office hours, receive dispatches, whether from other telegraph lines or other companies, or individuals, and shall, upon the usual terms, transmit the same with impartiality and good faith, and in the order of time in which they are received, and shall in no manner discriminate in rates charged, or words or

¹ *Western Union Tel. Co. v. Reynolds*, 77 Va. 173; s. c., 46 Am. Rep. 715.

figures charged for, or manner or conditions of service between any of its patrons, but shall serve individuals, corporations, and other telegraphic companies with impartiality: provided, however, that arrangements may be made with the publishers of newspapers for transmission of intelligence of general public interest out of its order, and that communication for and from officers of justice shall take precedence of all others."¹ This statute extends only to acts or omissions involving *partiality* or *bad faith*, and under it there can be no recovery for mere *negligence*.²

§ 160. Missouri Statute Giving a Penalty.—A

¹ Ind. Act April 8, 1885, § 1; Ind. Laws 1885, p. 151. The second section contains a somewhat similar provision with reference to telephone companies; and the third section imposes a penalty of one hundred dollars for a violation of any of the provisions of the act, and provides that the act shall not be construed as taking away the preventive remedy in equity by injunction or otherwise.

² Western Union Tel. Co. v. Steele, 108 Ind. 163; s. c., 9 N. E. Rep. 78; 6 West. Rep. 410; Western Union Tel. Co. v. Swain, 109 Ind. 405; s. c., 9 N. E. Rep. 927; 7 West. Rep. 531; Western Union Tel. Co. v. Jones, 116 Ind. 361; s. c., 18 N. E. Rep. 529. This act repeals by implication § 4176 of the Revised statutes of 1881 (Western Union Tel. Co. v. Brown, 108 Ind. 538; Western Union Tel. Co. v. Steele, *Id.* 163); but it does not repeal § 4178 of the Statutes of 1881, which requires telegraph companies to deliver, by messenger, all dispatches to the persons to whom they are addressed, "provided such persons * * * reside within one mile of the telegraphic station, or within the city or town in which such station is." Reese v. Western Union Tel. Co., 123 Ind. 294; s. c., 24 N. E. Rep. 163. The office of this repealed statute is well illustrated by a case where the defendant had two telegraph offices in a town, about eighty yards apart, one on a direct line to B., the other on a line over which a message to B. required several repetitions. The plaintiff presented a message for B. at the latter office, which was refused, on the ground that the other office had the direct line; but an offer was made to send it immediately to the other office. This offer the plaintiff refused, and took the message himself to the other office, whence it was promptly sent. It was held, that defendant's refusal did not entitle plaintiff to recover a penalty imposed for failure to transmit a message. Ind. Rev. St. 1881, § 4176; Western Union Tel. Co. v. Wilson, 108 Ind. 308; s. c., 9 N. E. Rep. 172; 6 West. Rep. 547.

statute of Missouri is as follows: "It shall be the duty of every telegraph or telephone company, incorporated or unincorporated, operating any telephone or telegraph line in this State, to provide sufficient facilities at all its offices for the dispatch of the business of the public, to receive dispatches from and for other telephone or telegraph lines, and from or for any individual, and on payment or tender of their usual charges for transmitting dispatches, as established by the rules and regulations of such telephone or telegraph line, to transmit the same promptly and with impartiality and good faith, under a penalty of two hundred dollars for every neglect or refusal so to do, to be recovered, with costs of suit, by civil action, by the person or persons sending or desiring to send such dispatch, one-half of the amount recovered to be retained by the plaintiff, and one-half to be paid into the county public school fund of the county in which the suit was instituted; and the burden of proof shall be upon the company to show that the wire was engaged as the reason for the delay in transmitting such dispatch.'" Under this statute a telegraph company operating a telegraphic line in this State is liable for the prescribed penalty of one hundred dollars for the failure to transmit a message, received by it with payment of its charges therefor; it is not necessary that the failure shall be due to partiality or bad faith on its part; it may be the result of mere negligence.¹ The court say:

"We rather think that the duty stated in the clause of the statute above quoted must be understood as being a condensed

¹ Rev. St. 1889, § 2725.

² Burnett v. Western Union Tel. Co., 39 Mo. App. 599.

statement of a three-fold duty: First, to transmit messages tendered for that purpose with the charges established by the company's rules and regulations. Second, to transmit such messages with impartiality. Third, to transmit such messages with good faith. We also think that the word 'neglect' in the succeeding clause, which reads, 'under a penalty of one hundred dollars for every neglect or refusal so to do,' is to be construed as meaning neglect to perform either of these three duties. The defendant's view would fritter the statute away, and render it entirely useless in every case where the dispatch is received and the customary charges collected, and the dispatch is not sent at all, as in the case at bar. How, in the nature of things, could the sender of the dispatch prove, beyond the inference that would arise from the mere failure to transmit, that the company had been guilty of partiality and bad faith? How could he get out of the employees of the defendant, who alone would have knowledge of the real reason of the failure to transmit the dispatch, evidence which would convict them of so gross a violation of duty? Under such a view of the statute, the agent of the telegraph company could receive the dispatch, and throw it into the waste basket, or into the fire, the moment the sender's back was turned, and the latter could never recover the penalty denounced by the statute. This would cut the statute down so as to make it mean that the penalty could be recovered only in cases where the dispatch was in fact transmitted, but where it was not transmitted with impartiality, that is, where other dispatches received later had been sent before it; or where it had not been transmitted in good faith, that is, where the agents of the company had corruptly delayed sending it to effect some purpose that might be imagined. We think that this would be a partial judicial repeal of the statute.¹

A similar construction was put by the Supreme Court of Indiana upon the early statute of that State, which required telegraph companies, under a penalty, to transmit dispatches "with impartiality and good faith, and in the order of time in which they are received, under penalty in case of failure 'to transmit or if postponed out of such order, of

¹ *Burnett v. Western Union Tel. Co.*, 39 Mo. App. 599, 607.

one hundred dollars, to be recovered by the person whose dispatch is *neglected* or postponed.' ”

§ 161. **Not Liquidated Damages, but a Penalty.**—The Indiana statute of 1885, already cited,¹ does not award *liquidated damages* for failing to perform the duty enjoined, but awards a *penalty*. “All our decisions,” said ELLIOTT, J., “affirm that the award is a penalty given by the statute to a private individual.”

§ 162. **Jury how Instructed as to Statutory Obligation to Transmit Messages in the Order in Which They are Received.**—Under the statute of Indiana, elsewhere referred to, which, though now repealed by implication,² remains a type of many still existing in other States,³ a case arose in which it was proved that the plaintiff delivered to the agent of the defendant a message in the words, “Come on the night train without fail to testify on behalf of,” etc., and explained to the agent the meaning and importance of the message, informing him that it was necessary for the person addressed to come on the night train in order to be present as witness the following day

¹ *Western Union Tel. Co. v. Buchanan*, 35 Ind. 429; s. c., 9 Am. Rep. 744.

² *Ante*, § 159, codified in Rev. Stat. Ind. 1888, Secs. 4176, 4176a.

³ *Western Union Tel. Co. v. Pendleton*, 95 Ind. 12; s. c., 48 Am. Rep. 692; citing *Carnahan v. Western Union Tel. Co.*, 89 Ind. 526; *Western Union Tel. Co. v. Adams*, 87 Ind. 598; s. c., 44 Am. Rep. 776; *Western Union Tel. Co. v. Gougar*, 84 Ind. 176; *Rogers v. Western Union Tel. Co.*, 78 Ind. 169; s. c., 41 Am. Rep. 558; *Western Union Tel. Co. v. Axtell*, 69 Ind. 199; *Western Union Tel. Co. v. Lindley*, 62 Ind. 371; *Western Union Tel. Co. v. Ferguson*, 57 Ind. 495; *Western Union Tel. Co. v. Hamilton*, 50 Ind. 181; *Western Union Tel. Co. v. Buchanan*, 35 Ind. 429; s. c., 9 Am. Rep. 744; *Western Union Tel. Co. v. Ward*, 23 Ind. 377. See a learned note on such statutes by Mr. Desty, 3 L. R. A. 224; also *Burnett v. Western Union Tel. Co.*, 39 Mo. App. 599, 605.

⁴ *Ante*, § 159, note.

⁵ See, for example, *ante*, § 160.

at a judicial examination. The message was not transmitted by the company until the following day. The following instruction given by the trial court expounding the statute was approved on appeal: "This is an action to recover a penalty of one hundred dollars for an alleged failure to transmit the message in the complaint specified by the defendants. The law requires of the defendant, where the agents of the telegraph company, in their proper office, receive messages, to transmit the same with impartiality and good faith, and in the order of time in which they are received; and a failure to comply with this requisition makes the company liable to the person whose dispatch is neglected or postponed. Private dispatches must give way, however, to transmission of intelligence of general and public interest; to communications for and from officers of justice. If you shall believe from the evidence that the plaintiff, acting as the attorney of Bixler and Iddings, went to the office of the Western Union Telegraph Company, at Indianapolis, with the message in the complaint specified, and inquired of the agent if the same could be sent immediately to Lafayette, and was informed that it could be immediately, and the plaintiff paid the charges demanded of him by such agent, and the sending of the message was postponed until the next morning, to an hour when it was too late for the message to be of any service, the plaintiff would be entitled to recover the penalty of one hundred dollars, unless the company has shown that, after receiving the message, the same could not be sent by reason of some derangement of the wires, or that the dispatch was postponed in consequence of the transmission

of intelligence of general and public interest, or communications for and from officers of justice.'"¹ It will be perceived that this construction casts upon the company the *onus* of showing that the failure to transmit the message was due to unavoidable causes. Such a statute, as thus construed, is therefore a wholesome corrective of the blunder into which some of the courts have fallen, of holding that a stipulation requiring messages to be repeated at extra cost casts upon the sender the burden of proving, by *other evidence* than the fact of the mistake or other default, that the company was negligent.²

§ 163. **Arkansas Statute Giving Penalty.**—In like manner, a statute of Arkansas of 1885,³ declaring that telegraph companies shall, under a penalty for refusal, transmit all messages without discrimination as to charges or promptness, does not create a liability for *negligence* in transmission, where there is a *bona fide* effort to transmit.⁴ Under a well-known rule relating to the construction of penal statutes, this statute is construed strictly, as is the case with the Indiana statute just referred to; and, as it does not in terms give an action for a mere failure to transmit or deliver, it is held that the party suffering by such a failure is remitted to his action for damages at common law.⁵ But as the party, when he seeks his remedy at common law is encountered with the rule that the stipulations

¹ *Western Union Tel. Co. v. Ward*, 23 Ind. 377; s. c., 85 Am. Dec. 462. Compare *Bryant v. American Tel. Co.*, 1 Daly (N. Y.), 575.

² *Post*, §§ 221, 222.

³ Ark. Stat. March 31, 1885, Sec. 10.

⁴ *Frauenthal v. Western Union Tel. Co.*, 50 Ark. 78; s. c., 21 Am. & Eng. Corp. Cas. 70; 6 S. W. Rep. 236.

⁵ *Frauenthal v. Western Union Tel. Co.*, *supra*; *Baltimore, etc. Tel. Co. v. State*, 6 S. W. Rep. 513.

against liability which the company has imposed upon him are reasonable, unless the message is repeated at extra delay and 'expense,' and that the mere fact of the failure to deliver, does not, unless the message has been repeated, make out a case for damages, but imposes upon him the impossible condition of showing by *other evidence* that the company has been negligent,—it may well be doubted whether the courts of Indiana and Arkansas have not in both cases frittered away the protection to the public which the legislature intended.

§ 164. **How far Statutes Apply to Interstate Messages.**—Penal statutes, as is well known, can have no extraterritorial force. A penal statute enacted by a State, which should undertake to punish defaults in the transmission of telegraphic dispatches over interstate lines, would no doubt be held void, as being an attempt to regulate commerce between the States, and therefore infringing that clause of the Constitution of the United States which commits the regulation of interstate commerce to Congress. The just view has therefore been taken that a statute¹ imposing a penalty upon telegraph companies for failure to transmit and deliver messages, does not apply to a message *sent from another State to a place within the State.*² But in the view of the same court the rule does not apply to cases where the message was delivered to a telegraph company in Indiana for transmission to a place in another

¹ *Post*, § 221.

² Here Sec. 4176 of the Revised Statutes of Indiana of 1881 (since repealed by implication, as already seen).

³ *Rogers v. Western Union Tel. Co.*, 122 Ind. 395; s. c., 24 N. E. Rep. 157; *Carnahan v. Western Union Tel. Co.*, 89 Ind. 526; *Western Union Tel. Co. v. Reed*, 96 Ind. 195.

State—in which case the court held that the fact that the act of negligence which prevented the message from reaching its destination occurred out of the former State, will not defeat a recovery in that State.¹

§ 165. **Validity of Statute Imposing a Penalty where Dispatch is Sent to Another State.**—It has been held by the same court that a statute imposing a penalty on a telegraph company for failure to transmit a message is not unconstitutional, even as to a message addressed to a person in another State, and that the sender may recover the penalty. The court hold that the statute in such a relation is not an invasion of the exclusive power of Congress to regulate commerce among the several States. “The statute,” said ELLIOTT, J., “operates in favor of the sender of the message delivered at an office in this State, and upon a corporation represented within our borders by its agents and officers. The parties are therefore within our jurisdiction. The duty which the statute assumes to enforce is one arising in Indiana, for it grows out of and is founded upon an undertaking entered into in this State. The parties and subject-matter being within our jurisdiction, they are subject to our laws. Persons and property within the jurisdiction of a State are subject to the laws of that State. The duty which the statute seeks to enforce is owing here in Indiana, and not elsewhere; it was here that the contract was made which imposed the duty on the telegraph

¹ *Western Union Tel. Co. v. Hamilton*, 50 Ind. 181. See also *Western Union Tel. Co. v. Fenton*, 52 Ind. 1. These decisions were under the former statute of Indiana, under which it was held that there could be a recovery of the penalty, although the default occurred through negligence merely. See *ante*, § 159, note.

company, and it was here that the failure occurred, for the message was not transmitted, as the law commands, in good faith and with diligence and impartiality. The duty which the company failed to perform was not a duty owing in Iowa, but was a duty owing in Indiana, where the parties executed the contract out of which the duty arose. The duty of the company did not end at the State line; it extended throughout the whole scope of the undertaking, and required the message to be transmitted and delivered, in good faith and with reasonable diligence, to the person to whom it was sent. The breach of duty, no matter where the specific act constituting it occurred, was a breach here and not elsewhere. The duty is a general and continuous one, and if not performed, the failure to perform, irrespective of the place where the failure occurred, is a breach of the duty at the place of its creation. There is not the slightest resemblance between such a case as this and cases of distinct and independent wrongs occurring wholly beyond the limits of the State; nor is there the remotest analogy between such a case as the present and the case of an attempt to enforce in one jurisdiction the laws of another State or nation. There is here no attempt to enforce the law of another State, nor to enforce a penalty for a breach of a duty created by a foreign statute. The action is in an Indiana forum to enforce a duty created by an Indiana statute, and arising out of an Indiana contract made by parties within the State.”¹

¹ *Western Union Tel. Co. v. Pendleton*, 95 Ind. 12; s. c., 48 Am. Rep. 692; reaffirming *Western Union Tel. Co. v. Hamilton*, 50 Ind. 181; *Western Union Tel. Co. v. Lindley*, 62 Ind. 371; *Carnahan v. Western Union Tel. Co.*, 89 Ind. 526.

§ 166. **No Action for Penalty for Non-Delivery of Message Delivered to be Sent on Sunday.**—In Indiana, where it is ruled that contracts made on the first day of the week, commonly called Sunday, are void and incapable of enforcement, not by the common law of the State, but by statute,¹ it has been held that an action cannot be maintained against a telegraph company to recover a statutory penalty for failing to transmit and deliver a message which was placed in the hands of the company on Sunday, and the contract for the transmission of which was made on that day, the dispatch not relating to a *work of necessity*.² So, in Missouri, the penalties given by a statute, against a telegraph company for failing to inform one who sends a dispatch for transmission, when required by him, that the line is *not in working order*, or that dispatches already on hand for transmission will occupy the time, or for intentionally giving *false information* to him in relation to the time within which the dispatch may be sent,³ are not recoverable, where the company has neglected

¹ Reynolds v. Stevenson, 4 Ind. 619; Banks v. Werts, 13 Ind. 203; Love v. Wells, 25 Ind. 503; Davis v. Barger, 57 Ind. 54; Gilbert v. Vashon, 69 Ind. 372; Parker v. Pitts, 73 Ind. 597; s. c., 38 Am. Rep. 155; Mueller v. State, 76 Ind. 310; s. c., 40 Am. Rep. 245. In one of these cases it was held that a replevin bond executed on Sunday was invalid. Link v. Clemens, 7 Blackf. (Ind.) 480. In another case the same pious regard for the Lord's day induced the court to hold that a *subscription to a church* made on Sunday was void—the end even here not justifying the means, or rather the time. Catlet v. Trustees, 62 Ind. 365; s. c., 30 Am. Rep. 197. Nay, this wicked contract was not even rendered valid by a subsequent oral promise to pay the subscription, the same having been given without consideration. *Ibid.* But see Evansville v. Morris, 87 Ind. 269, overruling Davis v. Barger, 57 Ind. 54, and cases following it.

² Rogers v. Western Union Tel. Co., 78 Ind. 169; s. c., 41 Am. Rep. 558.

³ Such as Rev. Stat. Mo. 1879, § 885.

or refused to transmit an ordinary business dispatch on Sunday, there being a general statute of the State¹ prohibiting work and labor on Sunday, except works of necessity or charity.'

§ 167. **Exception where the Dispatch Relates to a Work of Necessity.**—But if the dispatch, on its face, shows that it relates to a "work of necessity," or if the company were clearly apprised that such was its character, the rule might be different. Such would seem to be the intimation in the Indiana case quoted in the preceding section.² But it is said that "courts cannot declare, as a matter of law, that the business of telegraphy is a work of necessity. There are doubtless many cases in which the sending and delivery of a message would be a work of necessity within the meaning of our statute. But we cannot judicially declare that all contracts for the transmission of telegraphic messages are to be deemed within the statutory exception. Whether a contract is within the exception must be determined, as a question of fact, from the evidence in each particular case."³ A message which, on its face, relates to mere secular business, such as a message reading: "Bring \$40 if you want record,"—does not, without a showing of extrinsic facts tending to vary its apparent import, show necessity.⁴ So, under a statute

¹ Rev. Stat. Mo. 1879, § 1578.

² *Thompson v. Western Union Tel. Co.*, 32 Mo. App. 191.

³ *Rogers v. Western Union Tel. Co.*, 78 Ind. 169; s. c., 41 Am. Rep. 558.

⁴ *Ibid.*; opinion by Elliott, C. J.

⁵ *Western Union Tel. Co. v. Yopst*, 118 Ind. 248; s. c., 20 N. E. Rep. 222; 21 Am. & Eng. Corp. Cas. 88; 25 *Id.* 514; 3 Lawy. Rep. Ann. 224. In this case it appeared that the plaintiff, a stenographer, was ordered to copy certain evidence taken at the trial, so that counsel might prepare

giving a penalty against a telegraph company for failure to transmit and deliver messages, it has been held that the penalty cannot be recovered for the failure of the company to transmit and deliver a message inviting the person addressed to pay a visit to the sender, in the following language: "Come up in the morning—bring all,"—such a dispatch not being a work of necessity within the statute of Indiana prohibiting work and labor on Sunday."¹ In another case it has been said that "ordinary business" is not a work of necessity;² but it is obvious that this may or may not be so, according to circumstances.

§ 168. **Burden of Proof as to Necessity.**—The burden of proof as to a necessity for sending a telegram on Sunday, in an action to recover a penalty for failure to transmit it, is upon the plaintiff.³

§ 169. **Exception in Cases of Necessity or Charity.**—Under the statute of Missouri prohibiting work on Sunday, it is no defense that the message was delivered to the telegraph company on a Sunday for transmission, when the sending of it is an act of necessity or of charity; and the sending of it is such an act, when it is sent from a husband to his wife, and its purpose is to explain a protracted absence

his bill of exceptions for the judge's signature within 60 days from January 20th. The copy was finished, and the message for the attorney was delivered to defendant on Sunday, March 18th. The judge was then holding court in a county other than that of the attorney's residence. The copy was made with all possible dispatch, but the plaintiff knew on the day before, that he would finish it on Sunday. It appeared that the attorney got his copy, and had his bill signed. This was held insufficient to show a necessity for sending the message on Sunday.

¹ *Rogers v. Western Union Tel. Co.*, 78 Ind. 169; s. c., 41 Am. Rep. 558.

² *Thompson v. Western Union Tel. Co.*, 32 Mo. App. 191.

³ *Western Union Tel. Co. v. Yopst*, 118 Ind. 248; s. c., 3 L. R. A. 224; 20 N. E. Rep. 222.

of the former from home, and to announce the time of his return. The court discussed at some length the meaning of the word "charity," and concluded by saying: "The word, as used in the statute, is intended to be understood in its ordinary sense, and to denote something more than mere almsgiving; and it is plain that an act, intended by a husband to allay anxiety and distress of mind on the part of his wife and children, may be performed on Sunday as a work of charity, without violating the statute above quoted."¹

§ 170. **The Necessity may be a Moral or Social Necessity.**—In the same case the court say: "Then, as to the view which the trial court took, that the necessity which will authorize the doing of work on Sunday 'may be a necessity arising from inadvertence on the part of the person pleading the necessity, but not from willfulness,' we think that that is the correct view. We also think that the court rightfully refused the instruction tendered by the defendant, that 'if the plaintiff neglected to send a similar dispatch or similar information on the preceding day, and, by such neglect on his part, created the necessity for sending it on Sunday, he cannot recover.' We must here recur to the view that the necessity is not a physical, but a moral necessity. If a husband absents himself from his wife and family beyond the promised length of time, and neglects on Saturday to send them information of his whereabouts and the time of his return, he is clearly under the moral duty of sending such information on Sunday, and this moral duty which he owes to them creates a necessity within the mean-

¹ *Burnett v. Western Union Tel. Co.*, 39 Mo. App. 599, 614.

ing of the statute.”¹ The same court, in a subsequent case, reaffirmed this principle, and applied it to a state of facts where a young gentleman had started on Sunday to make a visit to a young lady in a distant city, had gone into a restaurant to get some refreshments, and in consequence of this got left by the railway train. The court reasoned that there was such a thing as a social as well as a moral or physical necessity, and that whatever right-thinking men would feel it incumbent upon themselves to do under given circumstances, may be regarded as a necessity within the meaning of the statute.²

§ 171. **The Necessity may be Created by Negligence.**—The delivery of such a telegram for transmission on a Sunday is not rendered illegal by the fact that the sender could as well have sent it on the preceding Saturday, but through inadvertence failed so to do. In so holding, the court say: “The duty and the necessity exist, although the circumstances creating them may have been the result of his previous negligence. But even if the plaintiff’s negligence may have created this necessity, we do not see how such negligence could be regarded as rendering it improper for him to perform the duty, and for the defendant to assist him in its performance, if it was a work of *charity*. Can any one say that a man’s negligence on Saturday to perform a work of charity will render it the less obligatory upon him to perform it on Sunday?”³

¹ *Burnett v. Western Union Tel. Co.*, 39 Mo. App. 599, 614.

² *Bassett v. Western Union Tel. Co.*, No. 4884, St. Louis Ct. of Appeals, not yet reported.

³ *Burnett v. Western Union Tel. Co.*, 39 Mo. App. 599, 614; reaffirmed in *Bassett v. Western Union Tel. Co.*, St. Louis Ct. of Appeals, No. 4884, not yet reported.

§ 172. **Retention of the Money not a Ratification by Telegraph Company.**—A pious tenderness for the sanctity of the Lord's day, although it may result in enabling a corporation to act dishonestly towards its customers, has led to the conclusion that the fact that the telegraph company retains the money paid for the transmission of the dispatch after the expiration of the Lord's day, that is, keeps it on Monday and on following days,—does not amount to a *ratification* of its undertaking, so as to entitle the plaintiff to enforce his statutory right to a penalty for failing to transmit and deliver it.¹

§ 173. **No Penalty for Refusing to Transmit Obscene Messages.**—A telegraph company will be excused from the transmission of a message expressed in indecent, obscene, or filthy language;² but the following was held not to be such: "Send me four girls on first train to Francisville, to tend fair."³

§ 174. **Penalty for Refusing Dispatches of Competing Lines.**—A statutory provision requiring telegraph companies to receive and forward dispatches from other telegraph lines, as well as from individuals, "provided that nothing contained in this section shall be construed to require any telegraph company or association to receive and transmit dispatches from or for any other company or association owning a line of telegraph parallel with, or doing business in competition with, the line over which the dispatch is required to be sent,"—has been held not to exempt a company from the obligation

¹ *Rogers v. Western Union Tel. Co.*, 78 Ind. 169; s. c., 41 Am. Rep. 558. The court quote *Perkins v. Jones*, 26 Ind. 499, as settling the law that the retention of what has been received under a contract entered into on Sunday will not of itself be a ratification.

² *Ante*, § 150.

³ Compare *Western Union Tel. Co. v. Ferguson*, 57 Ind. 495.

to receive and transmit a message from a competing line, to be transmitted to a point to which the line of the latter company did not extend.¹

§ 175. **When Notice to the Company Necessary.**—Under the Indiana statute, which provides that the plaintiff must give written notice of default on the part of defendant, the statutory penalty for violation of the duty created by the contract cannot be recovered unless such notice is given.²

§ 176. **When Payment of Actual Damages no Bar to Recovery of a Penalty.**—Payment by a telegraph company of expenses incurred by a person, by reason of non-delivery of a telegram, has been held no bar to an action for a penalty, unless received in full settlement or by way of accord and satisfaction.³

§ 177. **Action for Penalty by Addressee.**—Under a statute of Mississippi⁴ providing that on a failure or refusal of a telegraph company to transmit or deliver, within a reasonable time, without good excuse, any message delivered to it for such purpose, the person injured shall recover \$20 in addition to such damages as are allowed by law,—the person to whom a message, of no pecuniary value to him, is sent, the charges being paid by the sender, may sue for such statutory penalty for failure to deliver the same in a reasonable time without excuse, though he sustained no pecuniary loss by such failure.⁵

¹ *United States Tel. Co. v. Western Union Tel. Co.*, 56 Barb. (N. Y.) 46.

² *Western Union Tel. Co. v. Yopst*, 118 Ind. 248; s. c., 20 N. E. Rep. 222; 3 Lawy. Rep. Ann. 224; 21 Am. & Eng. Corp. Cas. 88; 25 *Id.* 514.

³ *Western Union Tel. Co. v. Taylor*, 84 Ga. 408; s. c., 8 L. R. A. 189; 11 S. E. Rep. 396.

⁴ Acts Miss. 1886, p. 91.

⁵ *Western Union Tel. Co. v. Allen*, 66 Miss. 549; s. c., 6 South. Rep. 461.

§ 178. **Jurisdiction of Such Actions: Justices of the Peace.**—Under the provision of the Arkansas Constitution of 1874, confining the civil jurisdiction of justices of the peace to actions arising on contract, actions of replevin, and actions for injuries to personal property,¹ a justice of the peace has no jurisdiction of an action against a telegraph company to recover a penalty for its failure to deliver a message.²

¹ Const. Ark., art. 7, § 40.

² Baltimore, etc. Tel. Co. v. Lovejoy, 48 Ark. 301; s. c., 3 S. W. Rep. 183.

CHAPTER VIII.

STIPULATIONS AND REGULATIONS LIMITING LIABILITY.

Article I. VALIDITY OF SUCH STIPULATIONS AND REGULATIONS.

Article II. EVIDENCE OF KNOWLEDGE AND ASSENT.

Article III. STIPULATIONS AS TO REPEATING.

Article IV. STIPULATIONS AND LIMITATIONS AS TO TIME AND MANNER OF PRESENTING CLAIMS FOR DAMAGES.

ARTICLE I.—VALIDITY OF SUCH STIPULATIONS AND REGULATIONS.

SECTION.

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184. A Comprehensive Statement of the Doctrine.
185. Such Regulations must be Reasonable.
186. View that They can Stipulate against Liability except for Gross Negligence, Willful Misconduct or Fraud.
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196. Reasonableness of a Regulation Requiring Deposit to Pay for Answer.

197. Reasonableness of Regulation Requiring Deposit to Pay for Charges of Delivery.
198. Evidence of Local Usage Inadmissible to Vary the Contract.
199. Reasonableness of Regulation when a Question of Law and when a Question of Fact.
200. Instances where Determined as a Question of Law.
201. Invalidity of Stipulations on Night or Half Rate Messages Exonerating from Liability.
202. Valid except in Cases of Gross Negligence or Fraud.

§ 183. **Cannot Limit Liability for Gross Negligence.**—Irrespective of the question whether the business of the telegraph company is similar to that of a common carrier, the American courts are generally agreed that, while such companies may establish and enforce reasonable rules and regulations for the safe and proper conduct of their business, they cannot establish any regulation, or bind the sender of a message in any contract, which will relieve the company from liability for the gross negligence, willful misconduct, or bad faith of itself or of its servants.¹

¹ *United States Tel. Co. v. Gildersleeve*, 29 Md. 232, 248; s. c., 96 Am. Dec. 519; *Western Union Tel. Co. v. Fontaine*, 58 Ga. 433; *Western Union Tel. Co. v. Graham*, 1 Colo. 230; *Western Union Tel. Co. v. Buchanan*, 35 Ind. 429; *Western Union Tel. Co. v. MEEK*, 49 Ind. 53; *Western Union Tel. Co. v. Fenton*, 52 Ind. 1; *True v. International Tel. Co.*, 60 Me. 9, 17; *Candee v. Western Union Tel. Co.*, 34 Wis. 471; *Sweetland v. Illinois, etc. Tel. Co.*, 27 Iowa, 433; s. c., 1 Am. Rep. 285; *Manville v. Western Union Tel. Co.*, 37 Iowa, 214; *Grinnell v. Western Union Tel. Co.*, 113 Mass. 299; *Breese v. United States Tel. Co.*, 48 N. Y. 132; *Passmore v. Western Union Tel. Co.*, 78 Pa. St. 238; *American Union Tel. Co. v. Daughtery*, 89 Ala. 191; s. c., 7 South. Rep. 660. It is said by an authoritative court that such a company has a clear right to protect itself against extraordinary risk and liability, by such rules and regulations as may be required for that purpose. In the view of this court, "it would be manifestly unreasonable to hold these telegraph companies liable for every mistake or accidental delay that may occur in the operation of their lines. From the very nature of the service, while due diligence and good faith may be required at the hands of the company and its agents, accidents, delays, and miscarriages may occur, that the greatest

§ 184. **A Comprehensive Statement of the Doctrine.**—The subject was attentively gone over by the Supreme Judicial Court of Maine, in an able opinion by Kent, J., and the conclusions of the court were thus stated :

1. Telegraph companies offering to perform services for the public, at fixed rates, exercise a *quasi*-public employment.

2. Such a company may enforce and adopt reasonable rules and regulations for the convenient, prompt, and satisfactory performance of the act or duty undertaken.

3. This right in a company is not absolute or unlimited ; but such rules are subject to the test of reasonableness, in view of the rightful claims of public policy and private rights, and the enforcement of the obligation of good faith and honest effort to perform.

4. The test must be applied by the court; whenever the question arises on the validity of any such regulation, according to the rule already stated.

5. A rule or stipulation which covers all possible delinquencies, mistakes, delays, or neglects in amount of care cannot avoid. Hence, in England, and in many of the American States, provision has been made by statute authorizing these companies to prescribe rules and regulations whereby they may be protected against extraordinary liability." *United States Tel. Co. v. Gildersleve*, 29 Md. 232, 246; s. C., 96 Am. Dec. 519, 523, *per Alvey, J.* Substantially the same views will be found in the following cases: *Western Union Tel. Co. v. Carew*, 15 Mich. 525; s. C., 2 *Thomp. Neg.* 828; *Birney v. New York, etc. Tel. Co.*, 18 Md. 341; *Wann v. Western Union Tel. Co.*, 37 Mo. 472; *Wolf v. Western Union Tel. Co.*, 62 Pa. St. 83; *Western Union Tel. Co. v. Graham*, 1 Colo. 230; *Sweetland v. Western Union Tel. Co.*, 27 Iowa, 433; s. C., 1 *Am. Rep.* 285. Probably no court would deny the abstract statement of the law thus laid down. But few courts will agree that it may be applied as was done by the Maryland court, so as to excuse the company for failing to send a dispatch because there was the usual condition on the blank on which it was written in regard to repeating and answering.

transmitting, or delivering, or not delivering a message, from whatever cause arising, is not a reasonable regulation within this rule.

6. Such a rule is not saved from these objections by the condition of liability to repay, if required by the sender, the trifle paid to them. It is a mere evasion of the legal liability, and is never the measure of damages for non-performance of a contract of this kind.

“The company,” he continued, “is not the ultimate judge of the reasonableness of an adopted rule. And in this single proposition lies the gist of the whole matter. The court must determine in every case, when the question is fairly raised, whether the particular restriction or qualification is a reasonable exercise of the powers residing in the company.”¹

§ 185. **Such Regulations must be Reasonable.**—The well known rule in regard to the by-laws of corporations sustains a very close analogy to the regulations of telegraph companies in the conduct of their business and in the restriction of their liability.² Such regulations will therefore be set aside by the judicial courts: 1. When they contravene the constitution or laws of the United States. 2. When they contravene the constitution or laws or the public policy of the State by whose laws their validity is determined. 3. When they are otherwise unreasonable.³

¹ True v. International Tel. Co., 60 Me. 9, 18; s. c., 11 Am. Rep. 156.

² 1 Thomp. Corp. § 1021, *et seq.*

³ These views may be gathered from the following among other cases: Western Union Tel. Co. v. Graham, 1 Colo. 230; s. c., 9 Am. Rep. 136; Western Union Tel. Co. v. Buchanan, 35 Ind. 429; s. c., 9 Am. Rep. 744; Western Union Tel. Co. v. Meek, 49 Ind. 53; Western Union Tel. Co. v. Adams, 87 Id. 598; s. c., 44 Am. Rep. 744; Western

§ 186. **View that they can Stipulate against Liability except for Gross Negligence, Willful Misconduct or Fraud.**—There is, however, a class of cases in which the view is expressed that such companies can, by stipulations on their blanks, exonerate themselves from liability except for *gross negligence*, or willful misconduct;¹ and some of the courts add, for

Union Tel. Co. v. Young, 93 Ind. 118; Ellis v. American Tel. Co., 13 Allen (Mass.), 226; s. c., Allen Tel. Cas. 306; Atlantic, etc. Tel. Co. v. Western Union Tel. Co., 4 Daly (N. Y.), 527; Wolf v. Western Union Tel. Co., 62 Pa. St. 83; s. c., 1 Am. Rep. 387; Western Union Tel. Co. v. Reynolds, 77 Va. 173; s. c., 46 Am. Rep. 715; Helman v. Western Union Tel. Co., 57 Wis. 562; Redpath v. Western Union Tel. Co., 112 Mass. 71; s. c., 17 Am. Rep. 69; Western Union Tel. Co. v. Carew, 15 Mich. 525; s. c., Allen Tel. Cas. 345; Grinnell v. Western Union Tel. Co., 113 Mass. 299; s. c., 18 Am. Rep. 485; Breese v. United States Tel. Co., 48 N. Y. 132; s. c., 8 Am. Rep. 526; s. c., Allen Tel. Cas. 663; Young v. Western Union Tel. Co., 65 N. Y. 163; Passmore v. Western Union Tel. Co., 78 Pa. St. 238; Aiken v. Telegraph Co., 5 S. C. 358; Womack v. Western Union Tel. Co., 58 Tex. 176; s. c., 44 Am. Rep. 614; Baxter v. Dominion Tel. Co., 37 Up. Can. (Q. B.) 470; True v. International Tel. Co., 60 Me. 9; s. c., 11 Am. Rep. 156.

¹ Western Union Tel. Co. v. Buchanan, 35 Ind. 429; s. c., 9 Am. Rep. 744; United States Tel. Co. v. Gildersleeve, 29 Md. 232; s. c., 96 Am. Dec. 519; Ellis v. American Tel. Co., 13 Allen (Mass.), 226; Breese v. United States Tel. Co., 48 N. Y. 132; s. c., 8 Am. Rep. 526; Grinnell v. Western Union Tel. Co., 113 Mass. 299; s. c., 18 Am. Rep. 485; Wann v. Western Union Tel. Co., 37 Mo. 472; Western Union Tel. Co. v. Neill, 57 Tex. 283; s. c., 44 Am. Rep. 589 ("except when caused by the misconduct, fraud or want of due care"); Womack v. Western Union Tel. Co., 58 Tex. 176; s. c., 44 Am. Rep. 614; White v. Western Union Tel. Co., 5 McCrary (U. S.), 103; s. c., 14 Fed. Rep. 710; Western Union Tel. Co. v. Fontaine, 58 Ga. 433 ("gross negligence"). In the subsequent case of Western Union Tel. Co. v. Blanchard, 68 Ga. 299; s. c., 49 Am. Rep. 480, the court denied the proposition that the company could, by a regulation of its own, protect itself against every degree of negligence, except "gross negligence or fraud," and held that there was no error in refusing an instruction which embodied this proposition. In Kansas it has been said, speaking with reference to the condition in the blanks of the Western Union Telegraph Company in regard to repeating messages, that a telegraph company cannot, by such a stipulation, exonerate itself from liability for errors arising from *gross negligence*. Western Union Tel. Co. v. Crall, 38 Kan. 679; s. c., 5 Am. St. Rep. 795; Western Union Tel. Co. v. Howell, 38 Kan. 685. In North Carolina the view still obtains that a telegraph company may

fraud,¹ or for any conduct *inconsistent with good faith*.² It is not clear that the courts which make use of the expression gross negligence, in this connection, intend to take a distinction between ordinary negligence and gross negligence.³ Notwithstanding the reasoning of Lord Holt in the celebrated case of *Coggs v. Bernard*,⁴ modern judicial opinion is drifting toward the view that a division of care and, correlatively, of negligence, into degrees, is a matter too subtle and refined for the ordinary purposes of justice, and it has been well said that gross negligence is nothing more than negligence with an epithet. A review of the cases last cited leaves the mind in doubt whether, except in one or two of them, the court really intended to intimate that there is, in a judicial sense, a distinction between negligence and gross negligence, in respect of the liability of telegraph companies. In some of these cases it seems obvious that the expression has been inadvertently used, and that in others it has been employed for mere emphasis. In one of them, however, Mr. District Judge Foster, in charging a jury, defined gross negligence as meaning "that want of care which a person habitually careless and

limit its liability for *ordinary negligence* in sending unrepeatd messages, to the amount paid for the transmission of the message; but it cannot exempt itself where there has been *gross negligence*. *Pegram v. Western Union Tel. Co.*, 97 N. C. 57; s. c., 2 S. E. Rep. 256.

¹ *Candee v. Western Union Tel. Co.*, 58 Tex. 176; s. c., 17 Am. Rep. 452; *Western Union Tel. Co. v. Neill*, 57 Tex. 283; s. c., 44 Am. Rep. 589.

² *United States Tel. Co. v. Gildersleve*, 29 Md. 232; s. c., 96 Am. Dec. 519.

³ Compare, for instance, *Western Union Tel. Co. v. Gildersleve*, 29 Md. 282; s. c., 96 Am. Dec. 519, and *Western Union Tel. Co. v. Fontaine*, 58 Ga. 433.

⁴ 2 Ld. Raym. 909.

negligent would ordinarily exercise in business transactions.'"¹ It is not perceived in what respect this definition of gross negligence conveys a different idea from that which is conveyed by the word negligence, unless it is intended to convey the idea that negligence becomes gross by mere repetition. But this cannot be a sound view.

§ 187. **Evidence of Gross Negligence Within this Rule.**—The following state of facts has been held to afford evidence from which a jury might infer gross negligence on the part of the telegraph company. In a message containing nine words besides the address and signature of the sender, there were three mistakes. It was sent over the defendant's line on a fair day, in which there were no electrical or atmospheric disturbances. It was found that there was no similarity in the sounds, symbols and characters used in telegraphy for the words "Valley" and "Neosho" which could account for the former being changed into the latter in the transmission. In short, under the circumstances above named, it was held that there was evidence of gross negligence in making the following message: "Ship bones, sulky and trap to Valley Falls immediately. Graham Crall,"—read: "Ship bones, sulky and traps to Neosho Falls immediately. Graham Crolt."² In another case in the same State the word "Salina" appeared in the message as delivered, instead of the word "Salem," which was written in the message by the sender. It was found, as a fact, that the word Salem was so plainly written that it could not

¹ *White v. Western Union Tel. Co.*, 5 McCrary (U. S.), 103; s. c., 14 Fed. Rep. 710.

² *Western Union Tel. Co. v. Crall*, 38 Kan. 679; s. c., 5 Am. St. Rep. 795.

have been mistaken for the word "Salina," or for any other word, "by any person possessing ordinary eye-sight who would examine it with the slightest care." The court held that this was equivalent to a finding that the company's agent did not exercise the slightest care in the transmission of the message. The additional fact appeared that the manager of the firm to whom the message was sent feared a mistake, and that the agent of the company asked for a verification of the message. It was decided that this was notice to the company that a mistake was feared, and that, in view of all the facts, the company was guilty of *gross negligence*.¹ In another case a message was received by a telegraph company to be sent to plaintiff's attorney at N., and the agent at the transmitting office informed the agent at N. of the number of words contained in the message, and, having sent the message, received from the agent at N. the signal indicating that it had been properly received, and contained the number of words indicated. In an action for negligent delivery, the agent at N. admitted that the word "six" had been omitted before "hundred and sixty-three," and that the word "answer" was dropped, but testified that the atmospheric conditions at N. were not favorable when the message was received. It was held that the evidence showed gross negligence on the part of the company.²

§ 188. **Cannot Stipulate Against Liability for Simple Negligence.**—The sounder and better view, therefore, is believed to be that the law will not, in view of the public nature of the employment of tele-

¹ *Western Union Tel. Co. v. Howell*, 38 Kan. 685.

² *Western Union Tel. Co. v. Goodbar (Miss.)*, 7 South. Rep. 214.

graph companies, and on grounds of public policy, allow them to impose upon persons who solicit their services, contracts relieving themselves from liability for negligence, irrespective of any distinction between simple negligence and gross negligence. The reason of this rule is almost too plain for statement or discussion. The very undertaking of a telegraph company, whenever it receives a message for transmission, necessarily implies an engagement on its part to exercise care and diligence in transmitting it, and, negatively, not to be guilty of negligence in doing so. To allow it to engage to exercise diligence in the undertaking, and to accept pay for exercising diligence, the sender of the message thus executing the contract on his part, and then to allow it to stipulate that it shall not be liable if it do not exercise diligence, is at once the height of absurdity and the height of injustice. We find, therefore, that many courts in dealing with this subject have taken the simple and just view that such stipulations are of no validity in so far as they undertake to exonerate the telegraph company from the consequences of its own negligence.¹

¹ *Western Union Tel. Co. v. Graham*, 1 Colo. 230; s. c., 9 Am. Rep. 136; *Western Union Tel. Co. v. Blanchard*, 68 Ga. 299; s. c., 45 Am. Rep. 480; *Western Union Tel. Co. v. Fontaine*, 58 Ga. 433; *Hubbard v. Western Union Tel. Co.*, 33 Wis. 558; s. c., 14 Am. Rep. 775; *Western Union Tel. Co. v. Schotter*, 71 Ga. 760; *Tyler v. Western Union Tel. Co.*, 60 Ill. 421; s. c., 14 Am. Rep. 38; s. c., on second appeal, 74 Ill. 168; 24 Am. Rep. 279; *Western Union Tel. Co. v. Fenton*, 52 Ind. 1; *Baldwin v. United States Tel. Co.*, 45 N. Y. 744, 751; *Western Union Tel. Co. v. Meredith*, 95 Ind. 93; *Sweetland v. Illinois, etc. Tel. Co.*, 27 Iowa, 433; s. c., 1 Am. Rep. 285; *Manville v. Western Union Tel. Co.*, 37 Iowa, 214; s. c., 18 Am. Rep. 8; *Telegraph Co. v. Griswold*, 37 Ohio St. 301; s. c., 41 Am. Rep. 500; *Bell v. Dominion Tel. Co.*, 3 Mont. Leg. News, 406; *Smith v. Western Union Tel. Co.*, 83 Ky. 104; *Passmore v. Western Union Tel. Co.*, 9 Phila. 88; s. c., affirmed, 78 Pa. St. 238.

§ 189. **Reason of This Rule.**—These decisions proceed upon the view that such a company cannot, by stipulations imposed upon its customers, absolve itself from liability for the want of *ordinary or reasonable care*;¹ and some of them deny the proposition that they can be allowed to operate so as to relieve the company from liability except for gross negligence, holding that there is no difference in a juridical sense between negligence and gross negligence.² Others state that, in view of the public nature of their employment, they must bring it to that degree of skill and care which a prudent man would, under the circumstances, exercise in his own affairs; and that any stipulation by which they undertake to relieve themselves from this obligation or to restrict their liability for the failure to use such skill and care is contrary to public policy and void. It has been added that, to hold otherwise would arm them with a very dangerous power, and leave the public comparatively remediless.³

§ 190. **Cannot Limit Liability for Negligent Mistakes, Defective Instruments, etc.**—To state the foregoing rule more in the concrete, we find in several legal judgments the explicit declaration that such a

¹ "Notwithstanding this regulation or special agreement, it is still the duty of the defendant to employ skillful operators, use proper instruments, and, through its employees, to exercise ordinary and reasonable care in the transmission and delivery of messages." *Miller, J. in Manville v. Western Union Tel. Co.*, 37 Iowa, 214; s. c., 18 Am. Rep. 8, 11. To the same effect is *Sweetland v. Illinois, etc. Tel. Co.*, 27 Iowa, 433; s. c., 1 Am. Rep. 285; *Turner v. Hawkeye Tel. Co.*, 41 Iowa, 458; s. c., 20 Am. Rep. 605; *Harkness v. Western Union Tel. Co.*, 73 Iowa, 190; *Fowler v. Western Union Tel. Co.*, 80 Me. 381. So held as to express companies by the Supreme Court of the United States in *Express Co. v. Caldwell*, 21 Wall. (U. S.) 270.

² *Telegraph Co. v. Griswold*, 37 Ohio St. 301; s. c., 41 Am. Rep. 500.

³ *Smith v. Western Union Tel. Co.*, 83 Ky. 104; s. c., 4 Am. St. Rep. 126.

company cannot limit its liability for mistakes in the transmission of messages arising from the failure to use reasonable care and skill in the performance of the service or from those which arise from the use of defective instruments.¹

§ 191. **May Stipulate against Liability for Mistakes due to Climatic Influences.**—On the other hand, the courts agree that such a company ought not to be held responsible for mistakes occasioned by uncontrollable causes, such as atmospheric electricity or other climatic influences, provided the mistakes could not have been guarded against by the exercise of ordinary care and skill on the part of the operating agents, they being provided with proper instruments.² Such a company ought not to be held liable for mistakes due to such causes, but they will be allowed to stipulate against such a liability. But such a stipulation will not in every case afford a complete exoneration or prevent liability from attaching irrespective of the question of diligence, skill or negligence under the given conditions. If, for instance, by reason of atmospheric disturbances the message cannot be correctly transmitted, the further inquiry will be open, whether the company was not guilty of negligence in attempting to transmit it until the temporary causes affecting the insulation of its wires should pass away.³

§ 192. **Cannot Stipulate against Statutory Penalty.**—Statutory penalties imposed upon telegraph companies for non-feasance or misfeasance in the dis-

¹ Sweetland v. Illinois, etc. Tel. Co., 27 Iowa, 433; s. c., 1 Am. Rep. 285.

² Sweetland v. Illinois, etc. Tel. Co., 27 Iowa, 433; s. c., 1 Am. Rep. 285; White v. Western Union Tel. Co., 14 Fed. Rep. 710.

³ Western Union Tel. Co. v. Cohen, 73 Ga. 522.

charge of their public duties, are founded on views of public policy; and the purpose of the legislature in enacting them would be entirely defeated if a telegraph company could impose a stipulation upon the sender of the message not to exact the penalty.¹ Accordingly, where a statute imposes a penalty upon a telegraph company of \$100 for failing to transmit a dispatch, delivered to it with the payment or tender of the usual charge, a stipulation on a blank furnished by the company and used by the sender of a message limiting his recovery, in the case of an unpeated message, to the amount paid for transmission, is no defense to an action to recover the penalty. "The company cannot thus change the degree or measure of her statutory liability, by the adoption of rules and regulations."² Neither can such a company, by such a stipulation, evade the penalty of \$100, imposed by a statute of the same State³ for failure to transmit an unrepeatd message correctly.*

§ 193. **Unreasonableness of Condition Limiting Liability to the Cost Paid for Transmission.**—A clause in the blank furnished for use by a telegraph company, exonerating in general terms the company from all liability for mistakes or delays beyond the cost of the transmission of the message, is unreasonable and void as against public policy, and notwithstanding such a stipulation, the company will be liable for the actual damages sustained through its

¹ In this case 1 Gav. & Hord Ind. Stat., p. 611, § 1.

² *Western Union Tel. Co. v. Buchanan*, 35 Ind. 429; s. c., 9 Am. Rep. 744; *Western Union Tel. Co. v. Meek*, 49 Ind. 53; *Western Union Tel. Co. v. Adams*, 87 Ind. 598; s. c., 44 Am. Rep. 76. See *ante*, § 157, *et seq.*

³ *Rev. Stat. Ind. 1876*, p. 868; 1 *Rev. Stat. Ind. 1881*, § 4176.

⁴ *Western Union Tel. Co. v. Adams*, 87 Ind. 598; s. c., 44 Am. Rep. 776; *Western Union Tel. Co. v. Young*, 93 Ind. 118. See also *United States Tel. Co. v. Western Union Tel. Co.*, 56 Barb. (N. Y.) 46.

negligent failure to deliver the message.¹ The cases cited as authority for this proposition are but a type of numerous cases cited in the preceding paragraphs which expressly or impliedly so hold; and some of them apply the same rule to cases where the stipulation limits the liability of the company to double the cost of transmission. It has also been held that an agreement by the sender of a telegraph message not to claim damages for errors, delays, or non-delivery "happening from any cause, beyond a sum equal to *ten times* the amount paid for transmission" is void as contrary to public policy.²

§ 194. **Stamping Message "Accepted Subject to Delay."**—During a general strike of its operators, the Western Union Telegraph Company sought to protect itself from liability for delay by stamping all messages which it received with the words "accepted subject to delay." It was held by a subordinate court in New York City that the company had no right to insist upon the sender of a message consenting to its being so stamped.³

§ 195. **View that Such Stipulations do not Exempt from Liability to the Receiver of the Message.**—A stipulation on the message blanks of such a company, limiting its liability, will not, in the view of some courts, exempt it from liability to the *receiver* of the message if it is wrongly transmitted.

¹ True v. International Tel. Co., 60 Me. 9; s. c., 11 Am. Rep. 156; Gillis v. Western Union Tel. Co., 61 Vt. 461; s. c., 17 Atl. Rep. 736. See, *contra*, Bennett v. Telegraph Co., 2 N. Y. Supp. 365; s. c., 18 N. Y. St. Rep. 229; *Post*, § 232.

² Fowler v. Western Union Tel. Co., 80 Me. 381; s. c., 6 Am. St. Rep. 211; 15 Atl. Rep. 29; 38 Alb. L. J. 276; 16 Wash. L. Rep. 591; 4 Rail. & Corp. L. J. 46.

³ Marvin v. Western Union Tel. Co. (Dist. Ct. New York City), 15 Chicago Legal News, 416.

These decisions proceed upon the general idea that a public duty has been violated, for which the company is civilly responsible to the person to whom the message was directed, without any privity of contract between it and him.¹

§ 196. **Reasonableness of Regulation Requiring Deposit to Pay for Answer.**—A regulation of a telegraph company requiring the sender of a message, which calls for an answer, to deposit enough money to pay for an answer of ten words, has been held not unreasonable.² Where such a regulation was in force this case arose: The plaintiff sent from his hotel, which he was just about leaving, a message, by a messenger, to the telegraph office, with money for its prepayment, but not for the prepayment of the answer. The company refused to send the message, but sent it back to the hotel where it arrived after the plaintiff had left the town. It was held that he was not entitled to recover.³

§ 197. **Reasonableness of Regulation Requiring Deposit to Pay for Charges of Delivery.**—A regulation of a telegraph company, printed on its message blanks, prescribing the limits within which messages will be delivered free, and requiring a deposit to cover the cost of delivery if the message is to be delivered outside of those limits, has been held reasonable; so that if the person to whom the message is addressed lives outside the prescribed limits, the sender of the message, if he knows of the regula-

¹ *Western Union Tel. Co. v. Fenton*, 52 Ind. 1, 4; *New York, etc. Tel. Co. v. Dryburg*, 35 Pa. St. 298; *Harris v. Western Union Tel. Co.*, 9 Phila. (Pa.) 88.

² *Western Union Tel. Co. McGuire*, 104 Ind. 130; s. c., 54 Am. Rep. 296.

³ *Hewlett v. Western Union Tel. Co.*, 28 Fed. Rep. 181.

tion, must ascertain the fact and make the required deposit; and his illiteracy is no excuse for his failure so to do.¹

§ 198. **Evidence of Local Usage Inadmissible to Vary the Contract.**—In an action against a telegraph company for a mistake in sending a message, evidence of a usage in a local office of the company has been held inadmissible to vary the terms of the contract under which the message is sent, expressed on the message blank.²

§ 199. **Reasonableness of Regulation when a Question of Law and when a Question of Fact.**—As a general rule, the reasonableness of the regulations, as well as of the by-laws of a corporation, presents a question of law to be decided by the court, and not to be submitted to a jury. Questions may, however, arise with reference to the reasonableness of a particular regulation, where the question of reasonableness will depend upon a variety of circumstances or conditions, in which the opinion of twelve men in the jury box, comparing their experience, will be much better than that of the judge, proceeding upon the analogies of the law. When, therefore, the Supreme Court of the territory of Utah held, under a collection of facts, that whether a regulation closing a telegraph office on Sunday at 6 P. M. was reasonable, was a question for the jury,³ the court seems to have reached a sound conclusion.

¹ *Western Union Tel. Co. v. Henderson*, 89 Ala. 510; s. c., 7 South. Rep. 419; s. c., 30 Am. & Eng. Corp. Cas. 615.

² *Grinnell v. Western Union Tel. Co.*, 113 Mass. 299, 306; s. c., 18 Am. Rep. 485.

³ The case was that a telegraph company received a dispatch, and payment for its transmission to O., at 8:50 P. M. on Sunday. The telegram was a request to send a physician by the first train. It was received at O. at 8:09 P. M. The next train left at 11:30 P. M. The

§ 200. **Instances where Determined as a Question of Law.**—In most cases, however, the reasonableness of such regulations will be determined by the judge as a question of law. Such was the course taken where a gold and stock telegraph company put its instruments into the office of a subscriber on condition that he should not furnish copies to other persons, and that the company might remove the instruments if he should violate the condition,—the court holding the condition to be a reasonable one.¹ The question was likewise resolved as a question of law in another case, where a telegraph company had placed in the office of a broker a “stock ticker,” under a contract by which the broker agreed that the company might discontinue its service, without notice, whenever, in its judgment, any breach of the condition of the contract should have been made by him. Here it was held, that the regulation was an unreasonable one, and afforded no defense to an action to restrain the removal of the ticker; nor was the fact that plaintiff might maintain an action at law for damages a bar thereto.²

§ 201. **Invalidity of Stipulations on Night or Half-Rate Messages Exonerating from Liability.**—Telegraph companies have established the practice of sending messages during the *night*, when their

telegram was delivered at 7:35 A. M. the next day. The office hours at O. closed on Sunday at 6 P. M., and by the rules of the office, telegrams received after that time were not delivered until the next morning. *Held*, that it was for the jury to determine the reasonableness of such regulations. *Brown v. Western Union Tel. Co. (Utah)*, 21 Pac. Rep. 988.

¹ *Shepard v. Gold & Stock Telegraph Co.*, 38 Hun (N. Y.), 338.

² *Smith v. Gold, etc. Telegraph Co.*, 42 Hun (N. Y.), 454; s. c., 6 N. Y. St. Rep. 110.

wires are not burdened, at half the usual rates charged for day messages. It occurred to these companies, when this practice was invented, that it would be a happy idea if they could take the money of the person tendering the message, and then transmit the message or not, as to them should be convenient, and escape all liability for the non-performance of the obligation assumed. Accordingly they inserted in their night message blanks this condition: "The company will receive messages to be sent during the night at one-half the usual rates, on condition that the company shall not be liable for errors or the delay in the transmission or delivery, or for non-delivery, of such messages, from whatever cause occurring, and shall only be bound in such case to return the amount paid by the sender." This met with such disfavor by the courts that these companies concluded to make the slight concession to the public of paying to the sender of a message *an amount not exceeding ten times the sum paid* for the transmission, in case they should take his money and then throw his message into the waste-basket. They, accordingly, got up a new form of blanks containing these words: "The company will receive messages for transmission, to be sent without repetition during the night, at one-half the usual rates, on condition that the sender will agree that he will not claim damages from it for errors or delays, or for non-delivery of such messages, happening from any cause other than the acts of its corporate officers, beyond a sum equal to ten times the amount paid for transmission." Above the blank space reserved for writing the message, there are also these words:

“Send the following night message, subject to the above conditions, which are hereby agreed to.” The weight of authority is that such a stipulation is contrary to public policy and void, even though assented to by the sender of the message, in so far as it undertakes to absolve the company from any liability whatsoever, or from any liability beyond the obligation to return the sum paid for transmitting the message; and that it is also void for the reason that its terms are repugnant, in that the company assumes the obligation of sending the message, and in the same contract undertakes to exonerate itself from such obligation.¹

§ 202. **Valid Except in Cases of Gross Negligence or Fraud.**—Conforming to a view already stated,² there is some judicial authority to the effect that such a stipulation is valid and effectual, so far as to relieve the company from all liability beyond the stipulated sum, except for its own *gross negligence* or *fraud*,³ or, as was said in one case, except for miscarriages shown to have been occasioned by misconduct, fraud or want of due care.⁴

¹ True v. International Tel. Co., 60 Me. 9; s. c., 11 Am. Rep. 156; Allen Tel. Cas. 530; Bartlett v. Western Union Tel. Co., 62 Me. 209; s. c., 16 Am. Rep. 437; Fowler v. Western Union Tel. Co., 80 Me. 381; s. c., 6 Am. St. Rep. 211; 15 Atl. Rep. 29; Harkness v. Western Union Tel. Co., 73 Iowa, 190; Hubbard v. Western Union Tel. Co., 33 Wis. 558; 14 Am. Rep. 775; Candee v. Western Union Tel. Co., 34 Wis. 471; s. c., 17 Am. Rep. 452; Western Union Tel. Co. v. Fontaine, 58 Ga. 433.

² *Ante*, § 186.

³ Schwartz v. Atlantic, etc. Tel. Co., 18 Hun (N. Y.), 157; Aiken v. Telegraph Co., 5 S. C. 358; Jones v. Western Union Tel. Co., 18 Fed. Rep. 717.

⁴ Western Union Tel. Co. v. Neill, 57 Tex. 283; s. c., 44 Am. Rep. 589.

ARTICLE II.—EVIDENCE OF KNOWLEDGE AND ASSENT.

SECTION.

- 206. Proof of Knowledge of Regulation.
- 207. Stipulation on Message a Part of the Contract.
- 208. Various Statements of this Rule.
- 209. Illustrations.
- 210. Exceptional View that Actual Notice of the Stipulation must be Brought Home to the Sender.
- 211. View that Customer Bound to Know Rules of Company.
- 212. Unsoundness of this View.
- 213. View that Sender is Bound by Rules of whose Existence he has Knowledge.

§ 206. Proof of Knowledge of Regulation.—

Obviously, such a regulation, in order to bind the sender or receiver of a dispatch, must be brought, in some way, to the knowledge of the sender.¹ But if a regulation limiting the liability of the company is a reasonable one, such as the company may lawfully make, and is printed in plain type on the company's blanks, in such a manner as to call the attention of customers to it,² or displayed in conspicuous type on the wall in the company's office,³ it will be presumed that a customer sending a dis-

¹ *De Rutte v. New York, etc. Tel. Co.*, 1 *Daly* (N. Y.), 547, 559; s. c., 30 *How. Pr.* (N. Y.) 403.

² *Western Union Tel. Co. v. Carew*, 15 *Mich.* 525; *Young v. Western Union Tel. Co.*, 65 *N. Y.* 163; *Breese v. Western Union Tel. Co.*, 48 *N. Y.* 132, 139; s. c., 31 *How. Pr.* (N. Y.) 86; *Belger v. Dismore*, 51 *N. Y.* 166, 173; *Redpath v. Western Union Tel. Co.*, 112 *Mass.* 71. Compare *Grace v. Adams*, 100 *Mass.* 505. See next section.

³ *Blrney v. New York, etc. Tel. Co.*, 18 *Md.* 341.

patch on the blank; in the one case, or writing it in the office in the other, had notice of the regulation and assented to it. The fact that the condition is in small type will not alter the case, where there is large type attracting the attention of the sender of the message to it, so that the use of small type is not obscure and deceptive.¹

§ 207. **Stipulations on Messages a Part of the Contract.**—Telegraph companies generally furnish their customers with blanks upon which to write the messages which they wish to transmit. Upon these blanks are printed the regulations, conditions, or limitations upon which the company professes to transmit messages. These conditions, regulations or limitations, if not invalid within the rules previously stated, are generally regarded as forming a part of the contract between the company and the sender of the message.² Such printed stipulations are in the nature of a general proposition to the public of the terms on which all messages are to be sent; and one who writes a message on such a blank and delivers it to an agent of the company for transmission over its wires, is, in the view of most courts, deemed in law to have accepted the proposition which thus becomes a contract between him and the company.³ The sender of the message is thereafter *estopped* from denying that he assented to the regulations contained in it, although, as a matter of fact, he may not have read them.⁴

¹ *Wolf v. Western Union Tel. Co.*, 62 Pa. St. 83; s. c., 1 Am. Rep. 387.

² *United States Tel. Co. v. Gildersleve*, 29 Md. 232; s. c., 96 Am. Dec. 519; *Allen Tel. Cas.* 390.

³ *Western Union Tel. Co. v. Carew*, 15 Mich. 525; s. c., *Allen Tel. Cas.* 345; 2 *Thomp. Neg.* 829; *Hill v. Western Union Tel. Co. (Ga.)*, 11 S. E. Rep. 874.

⁴ *Grinnell v. Western Union Tel. Co.*, 113 Mass. 299; s. c., 18 Am.

§ 208. **Various Statements of this Rule.**—It is merely another expression of the same rule to say, as some courts do, that the transmission of the message is *evidence* of the assent of the sender to the printed conditions thereon, whether in fact he has read them or not.¹ Some courts qualify their statement of this doctrine by making this presumption of assent apply in the absence of any proof that the blanks were printed in such *small type*, or otherwise, as to mislead, or that the sender was so *illiterate* that he could not read them; or that, when furnished by the agent, he had no opportunity to read, and that the agent so knew.² Others say that he is bound by the restrictive stipulations on the message, whether he has read them or not, provided no fraud or imposition has been used to prevent him from acquiring knowledge of them.³ The rule that the printed matter of the form on which a telegraph message is written constitutes a contract between the sender and the telegraph company, is of especial application where the sender is accustomed to use similar forms. In such a case he is presumed to know their contents and to assent to the terms therein contained.⁴

Rep. 485; *Breese v. United States Tel. Co.*, 48 N. Y. 132; s. c., 8 Am. Rep. 526; *Womack v. Western Union Tel. Co.*, 58 Tex. 176; s. c., 44 Am. Rep. 614; *Belger v. Dinsmore*, 51 N. Y. 166.

¹ *Redpath v. Western Union Tel. Co.*, 112 Mass. 71; s. c., 17 Am. Rep. 69.

² *Earl, C.*, in *Breese v. United States Tel. Co.*, 48 N. Y. 132; s. c., 8 Am. Rep. 526, 531; *Lewis v. Great Western R. Co.*, 5 Hurl. & N. 867; *Wolf v. Western Union Tel. Co.*, 62 Pa. St. 83, 87; s. c., 1 Am. Rep. 387.

³ *Beasley v. Western Union Tel. Co.*, 39 Fed. Rep. 181. One who knows that a telegraph blank, when complete, contains certain agreements, cannot protect himself from their operation by showing that a portion of them was *torn from the blank* on which he wrote his message. *Kiley v. Western Union Tel. Co.*, 109 N. Y. 231; s. c., 16 N. E. Rep. 75.

⁴ *Bennett v. Western Union Tel. Co.*, 18 N. Y. St. Rep. 777; 2 N. Y. Supp. 365. In like manner, the general rule is that if a *shipper* takes a

§ 209. **Illustrations.**—The blanks now employed by the Western Union Telegraph Company, after reciting the conditions upon which alone the company will transmit messages, contain the following: "Send the following message subject to the above conditions and agreement." These words are followed by blank lines for writing in the message. When the message is thus written and signed by the sender, the frame of the language, it will be observed, appropriately constitutes a contract. In view of this fact it has been said: "A party using such a blank, and writing his dispatch thereon, assents to the terms and conditions on which it is to be sent. If he omits to read or to become informed of them, it is his own fault. A contract voluntarily signed and executed by a party, in the absence of misrepresentation or fraud, with full opportunity of information as to its contents, cannot be avoided on the ground of his negligence or omission to read it, or to avail himself of such information."¹ Where the sender told the operator that he knew nothing about the business, and wished he would write the message, which the operator did, and the sender signed on the operator pointing out the place, it was held, that the *operator* was, for that purpose, the

receipt from a *common carrier*, the terms of which limit the liability of the carrier, he will be presumed to know its contents and to have assented thereto. *Belger v. Dinsmore*, 51 N. Y. 166; *Grace v. Adams*, 100 Mass. 507; s. c., 1 Am. Rep. 131; *Rice v. Dwight*, 2 Cush. (Mass.) 87; *Soumet v. National Express Co.*, 66 Barb. (N. Y.) 284. In *Illinois* there is an exceptional rule on this point, that the mere reception of the receipt will not amount to evidence of an assent to the special limitations by the shipper. *Illinois Central R. Co. v. Frankenberg*, 54 Ill. 88. See 2 Thomp. Tr. § 1863 and notes.

¹ *Breese v. United States Tel. Co.*, 48 N. Y. 132; s. c., 8 Am. Rep. 526, 529, per Lott, C., Com'r.; s. c., *Allen Tel. Coss.* 663. See also *Womack v. Western Union Tel. Co.*, 58 Tex. 176; s. c., 44 Am. Rep. 614.

sender's agent, and the company was not liable for the sender's failure to notice the printed stipulation as to non-liability save for repeated messages.¹

§ 210. **Exceptional View that Actual Notice of the Stipulation must be Brought Home to the Sender.**—An exceptional view obtains in Illinois to the effect that the mere writing, signing and delivering, for transmission, of a message upon a blank furnished by a telegraph company, containing a condition limiting its liability, does not create a contract between the sender and the company, but, that, in order to make the condition binding upon the sender or upon the party for whom he acts as agent, a knowledge of the condition must be brought home to him by evidence *aliunde*. "Whether he had knowledge of its terms and assented to its restrictions is for the jury to determine, as a question of fact upon evidence *aliunde*; and all the circumstances attending the giving the receipt are admissible in evidence to enable the jury to decide that fact." In other words, the court hold that the fact that a telegram is written on such a blank does not raise a presumption of law or fact that the plaintiff had knowledge of it. The telegraph company, in the view of the court, must show that the sender had such knowledge, although the court say that slight evidence would be sufficient. Of this, however, the jury and not the court would be the judge.² This exceptional rule is adopted by analogy

¹ *Western Union Tel. Co. v. Edsall*, 63 Tex. 668.

² *Tyler v. Western Union Tel. Co.*, 60 Ill. 421; s. c., 14 Am. Rep. 38. In Pennsylvania, it has been ruled at *nisi prius* that the receiver of a message is not notified of the condition subject to which it was sent, by the following indorsement upon the message, without more: "Western Union Telegraph Company. The rules of this company require that messages received for transmission shall be written on the message-

to the rule which obtains in the same State in regard to conditions in the receipts or bills of lading of *common carriers*, limiting their liability. In such a case the mere taking and retaining of the receipt is not of itself evidence of the assent of the shipper to the special stipulations, but his assent must be otherwise affirmatively shown.¹ Some decisions of subordinate courts in New York² and Pennsylvania³ are in conformity with the exceptional rule in Illinois; but these decisions do not express the law as declared by the highest judicial tribunals of those States.⁴

blanks of the company, under and subject to the conditions printed therein, which conditions have been agreed to by the sender of the following message." This notification was only that there were regulations of the company, and that they had been agreed to by the sender of the message. No specifications of the nature of the regulations were given to the receiver of the message, nor any caution that they might be important for him to examine. There was nothing in such a notice to put him upon inquiry at his peril. *Harris v. Western Union Tel. Co.*, 9 Phila. (Pa.) 88.

¹ *Adam's Express Co. v. Haynes*, 42 Ill. 89; *Illinois Central R. Co. v. Frankenberg*, 54 Ill. 88. And see as to stipulations detached, as if on the back, etc., *Brown v. Eastern R. Co.*, 11 Cush. (Mass.) 97.

² *Baldwin v. United States Tel. Co.*, 1 Lans. (N. Y.) 125. The condition in this case is distinguished from that in *Breese v. United States Tel. Co.*, 48 N. Y. 132, in that the printed matter was a mere notice to the sender that the company would not be responsible unless the dispatch should be repeated, and hence formed no part of the agreement, being totally disconnected from the message. The question, however, was not properly in the case, and what was said was *obiter*.

³ *Harris v. Western Union Tel. Co.*, 9 Phila. (Pa.) 88.

⁴ *Breese v. United States Tel. Co.*, 48 N. Y. 132; s. c., 8 Am. Rep. 526; *Allen Tel. Cas.* 663; *Young v. Western Union Tel. Co.*, 65 N. Y. 163; *Passmore v. Western Union Tel. Co.*, 78 Pa. St. 238. In the case of *Harris v. Western Union Tel. Co.*, 9 Phila. (Pa.) 88, the court distinguish the facts from those in judgment in *Passmore v. Western Union Tel. Co.*, *supra*, in that in the latter case the action was brought by the sender, who was conceded to have had notice, whereas in the case before the court the action was brought by the receiver, and was in form an action in tort. The plaintiff did not know, so far as the report shows, of the stipulations; nor whether the message had or had not been repeated. The court held that, as he had acted on it to his damage, he was entitled to indemnity.

§ 211. **View that Customer Bound to know Rules of Company.**—In Maryland, where a telegraph company was authorized by statute to contract in accordance with its rules and regulations, the view was taken that a person delivering to it a message for transmission “is supposed to know that the engagements of the company are controlled by those rules and regulations, and does himself, in law, engraft them in his contract of bailment, and is bound by them.”¹ “This would be the case,” the same court has said, “whether the dispatch offered for transmission be expressly declared to be subject to the terms and conditions prescribed or not. Those dealing with the company must be supposed to know its rules and regulations, and their contract must be taken to have reference to them, unless otherwise provided by special contract.”²

§ 212. **Unsoundness of this View.**—It is submitted that these views are entirely misconceived. All corporations have the faculty of making reasonable by-laws for the transaction of their business. These by-laws are in the nature of private instruments for the regulation of their directors, managing officers and servants. They are not known to the public, and, both on principle and authority, the public are not charged with knowledge of them unless notice of them is expressly communicated. The better view is that, if the conditions are not printed on the blank on which the message is in fact written for transmission, a knowledge of them must be brought home to the sender by the defendant by other evi-

¹ *Birney v. New York, etc. Tel. Co.*, 18 Md. 341; s. c., 81 Am. Dec. 607; *Allen Tel. Cas.* 195; reaffirmed in *United States Tel. Co. v. Gildersleve*, 29 Md. 232; s. c., 96 Am. Dec. 519; *Allen Tel. Cas.* 403.

² *United States Tel. Co. v. Gildersleve*, *supra*, opinion by Alvey, J.

dence.¹ When, therefore, there was a question whether the person sending the message used a blank of the company containing its printed conditions, or whether this blank was used by an agent of the company in copying a message handed in by the sender on a plain piece of paper, it was held that the question of the liability of the company must turn on the findings of fact in the trial court.² In another case the message, as accepted for transmission, was written on a sheet of common white paper. It was held that the sender was not charged with notice of or assent to regulations of the company printed upon its blanks, without proof that he knew what they were; and that the fact that he was familiar with the general appearance of the blanks, and that bundles of them lay in his office, and that he was in the habit of using them, did not estop him from denying any knowledge of the regulations; nor was he, simply as a stockholder in the telegraph company, bound to know such rules and regulations, merely because they were recorded on the minute books of the corporation.³ Another court has taken the view that, although a telegraph company's rules prohibit its agents from receiving messages written otherwise than on its printed blanks, a sender ignorant of the prohibition is not bound thereby, and hence where the agent, without the sender's request, copies a message written on

¹ *De Rutte's Case*, 1 Daly (N. Y.), 547; s. c., 30 How. Pr. (N. Y.) 403.

² *Beasley v. Western Union Tel. Co.*, 39 Fed. Rep. 181.

³ *Pearsall v. Western Union Tel. Co.*, 44 Hun (N. Y.), 532; s. c., 9 N. Y. St. Rep. 132.

ordinary paper onto a blank, the sender will not be bound by the stipulations in the blank.¹

§ 213. **View that Sender is Bound by the Rules of whose Existence He has Knowledge.**—In one case, the view is expressed that a person sending a message by telegraph, who knows of the existence of certain rules and regulations adopted by the telegraph company touching the transmission of messages, is as much bound by them as if he had written his message on a blank prepared by the company, containing such rules.² Where the blanks furnished by the company, on one of which the message in question was written, had been for some time in the possession of the sender, which blanks contained an agreement between the signer and the company that the company would not be responsible for any error in the transmission of the dispatch unless it was repeated, the sender was conclusively presumed to have been acquainted with the contents of the blank form, and to have accepted them, and was estopped from denying or disputing the agreement. The governing principle was, that a contract voluntarily executed by a party, in the absence of misrepresentation or fraud, with full opportunity to inform himself as to its contents, cannot be avoided on the ground of his negligence or omission to read it, or to avail himself of the information contained in it.³

¹ *Beasley v. Western Union Tel. Co.*, 39 Fed. Rep. 181. Compare *Western Union Tel. Co. v. Foster*, 64 Tex. 220; s. c., 53 Am. Rep. 754.

² *Western Union Tel. Co. v. Buchanan*, 35 Ind. 429; s. c., 9 Am. Rep. 744, 748. In this case, the message was written on the back of a business card.

³ *Breese v. United States Tel. Co.*, 48 N. Y. 132 (affirming s. c., 45 Barb. (N. Y.) 274; 81 How. Pr. (N. Y.) 86).

ARTICLE III.—STIPULATIONS AS TO REPEATING.

SECTION.

217. Reasonableness of Regulation Requiring Message to be Repeated.
218. Does not Excuse Negligence or Other Fault.
219. Exempts it only from Risks beyond its Control.
220. Incongruity of this Rule.
221. Effect on the Burden of Proof and Evidence.
222. Comments on these Opposing Views.
223. Excuses Mistakes not Arising from Gross Negligence.
224. This View as Understood in Massachusetts.
225. Further of the Massachusetts Doctrine.
226. The Same View Taken in New York.
227. This Rule as Understood in Kentucky.
228. View that Condition as to Repeating Exonerates only from Liability for Errors Preventible by Repeating.
229. Illustrations of this View.
230. Illustrations Continued.
231. Cases of Exoneration under this Rule.
232. Continued.
233. Releases Liability for Mistakes of Connecting Line.
234. But does not Exonerate Connecting Line.
235. Simpler View that such Stipulations are Void.
236. Reasons Given for this View.
237. Receiver of Message under no Obligation to have it Repeated.
238. What Amounts to a Request to have the Message Repeated.
239. Waiver of such Stipulation a Question for Jury.
240. Such Stipulations Apply only to the Message—not to the Date.
241. Considerations Showing that the Condition as to Repeating is a mere Sham.

§ 217. Reasonableness of Regulation Requiring Message to be Repeated.—A regulation of such a company, to which the senders of messages are re

quired to assent, that the company will not be responsible for errors in the transmission of messages which are not repeated, has been held *reasonable* within the limits hereafter stated.¹

§ 218. **Does not Excuse Negligence or Other Fault.**—Several courts have limited the rule by holding that such companies cannot, by such stipulations, relieve themselves from the consequences of their own fault, such as want of proper skill and care on the part of their operators, or the use of defective instruments. As thus limited, the rule extends only so far as to relieve the company from mistakes occasioned by uncontrollable causes, such as atmospheric electricity, and this only when it appears that such mistakes could not have been guarded against or prevented by the exercise of ordinary care and skill on the part of the operating agents of the company.²

¹ *Western Union Tel. Co. v. Carew*, 15 Mich. 525; s. c., 2 Thomp. Neg. 828; *Birney v. New York, etc. Tel. Co.*, 18 Md. 341; *Breese v. United States Tel. Co.*, 45 Barb. (N. Y.), 274; s. c., 31 How. Pr. (N. Y.), 86 (affirmed, 48 N. Y. 132); *Redpath v. Western Union Tel. Co.*, 112 Mass. 71; *Grinnell v. Western Union Tel. Co.*, 113 Mass. 299; *Passmore v. Western Union Tel. Co.*, 78 Pa. St. 238; affirming s. c., 9 Phila. (Pa.) 90; *McAndrew v. Electric Tel. Co.*, 17 C. B. 3; *Sweetland v. Illinois, etc., Tel. Co.*, 27 Iowa, 433; *Manville v. Western Union Tel. Co.*, 37 Iowa, 214; *Wann v. Western Union Tel. Co.*, 37 Mo. 412; *Camp v. Western Union Tel. Co.*, 1 Metc. (Ky.) 164; s. c., 71 Am. Dec. 461; *Ellis v. American Tel. Co.*, 13 Allen (Mass.), 226; *DeRutte v. New York, etc. Tel. Co.*, 1 Daly (N. Y.), 547, 559; *Young v. Telegraph Co.*, 65 N. Y. 163; *Western Union Tel. Co. v. Fenton*, 52 Ind. 1; *Gulf, etc. R. Co. v. Wilson*, 69 Tex. 739; s. c., 7 S.W. Rep. 653; *Western Union Tel. Co. v. Stevenson*, 128 Pa. St. 442; s. c., 5 L. R. A. 515; 24 W. N. C. 497; s. c., 18 Atl. Rep. 441; *United States Tel. Co. v. Gildersleve*, 29 Md. 232; s. c., 96 Am. Dec. 519; *Bennett v. Western Union Tel. Co.*, 2 N. Y. Supp. 365; s. c., 18 N. Y. State Rep. 777; *Lassiter v. Tel. Co.*, 89 N. C. 334; *Western Union Tel. Co. v. Hearn*, 77 Tex. 83; s. c., 13 S. W. Rep. 970. *Contra*, *Seller v. Western Union Tel. Co.*, 3 Am. L. Rev. 777, a *nisi prius* case. See a note on this subject, collecting American decisions, 21 Am. & Eng. Corp. Cas. 85.

² *Sweetland v. Illinois, etc. Tel. Co.*, 27 Iowa, 433; *Marr v. Western*

§ 219. **Exempts it only from Risks beyond its Control.**—A condition printed upon the blank on which a telegraphic message is written for transmission, exempting the company from liability for errors in case the message is not repeated, is held by one court to exempt it only from errors arising from causes beyond its control. In other words, in this view it has no operation at all; since there is no rule of law that casts upon a telegraph company the responsibility of risks beyond its control. Such a rule would make it an insurer; and, as we have already seen,¹ all courts agree that it is not an insurer.

§ 220. **Incongruity of this Rule.**—The doctrine of the courts so holding seems to involve an absurdity. They start out on the premise that a telegraph company is not a common carrier, and is only liable for negligence or willful misconduct. They next state that such a company may make reasonable rules limiting its liability. They end by stating that it cannot make rules limiting its liability for negligence. But, as it is only liable for negligence, or, what is worse, for willful misconduct or bad faith, this is equivalent to saying that it cannot make rules limiting its liability at all. If it is said that the concession to such a company of the right to make reasonable rules limiting its liability means that it may protect itself from errors incident to the imperfection of the art and to atmospheric causes, the

Union Tel. Co., 85 Tenn. 529; s. c., 3 S. W. Rep. 496; *Pepper v. Western Union Tel. Co.*, 87 Tenn. 554; s. c., 11 S. W. Rep. 783; *Thompson v. Western Union Tel. Co.*, 64 Wis. 531; s. c., 54 Am. Rep. 644. Compare *Thompson v. Western Union Tel. Co.*, 106 N. C. 549; s. c., 11 S. E. Rep. 269; 30 Am. & Eng. Corp. Cas. 634.

¹ *Western Union Tel. Co. v. Tyler*, 74 Ill. 168; s. c., 24 Am. Rep. 279.

² *Ante*, § 137.

answer is, that if it is only liable for negligence, it is not liable at all for errors thus produced. If it is said that such a concession intends to enable it to protect itself from liability for the errors of other companies over whose lines it is obliged to send messages, the answer is, that it is not liable for the errors of other companies, unless it assumes such a liability by contract.¹ Of what value, then, is the rule, as thus expounded?

§ 221. **Effect on the Burden of Proof and Evidence.**—In some of the cases it is held that one of the effects of such a stipulation is to cast upon the sender of the message the burden of proving negligence by *other evidence* than the mere fact of the mistake,² as where the error, unexplained, consisted in writing "sixty" for "fifty."³ Accordingly it has been held proper, in an action presenting such a state of facts, to instruct the jury in these words: "If there were such rules and regulations, so assented to, the mere fact that there was an error in the message as delivered, would not, of itself, without further proof of carelessness, be sufficient to authorize the plaintiff to recover anything beyond the price of the message and interest thereon."⁴ Other courts have taken the juster and sounder view that,

¹ *Post*, § 264.

² *Sweetland v. Illinois, etc. Tel. Co.*, 27 Iowa, 433; *Womack v. Western Union Tel. Co.*, 58 Tex. 176; s. c., 44 Am. Rep. 614; *Becker v. Western Union Tel. Co.*, 11 Neb. 87; s. c., 38 Am. Rep. 356. This is also understood to be the logic of the decision in *Gulf, etc. R. Co. v. Wilson*, 69 Tex. 739; s. c., 7 S. W. Rep. 653. Substantially the same ruling was made in South Carolina, in regard to a stipulation on the blank of a night message, against liability beyond the amount paid by the sender. *Aiken v. Telegraph Co.*, 5 S. Car. 358, 377.

³ *Becker v. Western Union Tel. Co.*, 11 Neb. 87; s. c., 38 Am. Rep. 356.

⁴ *Ibid.*

in such a case, an error in transmitting the message being proved, the *onus* is on the company of proving that it arose from causes beyond its control.¹

§ 222. **Comments on these Opposing Views.**—Beyond all question, the rule of evidence in ordinary cases of bailment and other contractual engagements to perform services is that the unexplained failure of the undertaker to perform the services which he has undertaken to perform, is evidence of negligence on his part, in conformity with the maxim *res ipsa loquitur*.² The view which ascribes to such a stipulation the effect of requiring the plaintiff to prove negligence by other evidence than the evidence of the undertaking and of the default in its performance, therefore, has the effect of changing the rule of evidence in favor of the undertaker who has been

¹ *Western Union Tel. Co. v. Tyler*, 74 Ill. 168; s. c., 24 Am. Rep. 279; s. c., on former appeal, 60 Ill. 421; 14 Am. Rep. 38; *Bartlett v. Western Union Tel. Co.*, 62 Me. 209; s. c., 16 Am. Rep. 437. The subject was thoroughly considered by the Supreme Court of Illinois, in a case twice before it, and the rule announced by the court was, that the usual regulations exempting telegraph companies from liability for errors in un-repeated messages exempt them only from liability for errors arising from causes beyond their control; and that, the inaccuracy of the message being proved, the *onus* of relieving themselves from the presumption of negligence thereby raised rests upon the company. As to every thing beyond this, such a contract was said to be against public policy, without consideration, and void. *Tyler v. Western Union Tel. Co.*, 60 Ill. 421; s. c., 74 Ill. 168; *Rittenhouse v. Independent Line of Telegraph*, 44 N. Y. 263; *New York, etc. Tel. Co. v. Dryburg*, 35 Pa. St. 298; *Western Union Tel. Co. v. Fontaine*, 58 Ga. 433, 437, per Warner, J.; *De Rutte v. New York, etc. Tel. Co.*, 1 Daly (N. Y.), 547, 559; *De La Grange v. Southwestern Tel. Co.*, 25 La. An. 383. It has been held in Louisiana that where a message has been delivered to a company which may be designated A., and passed over a wire to a company which may be designated B., and is by B company communicated to the person to whom it is addressed in a garbled state, and such person brings an action for the resulting damages against B. company, the burden is upon B. company to show, if it can, that the error was the error of A. company, and that the message was by it delivered as it was received from A. company. *De La Grange v. Southwestern Tel. Co.*, 25 La. An. 383.

² *Post*, § 273.

guilty of the default. It must also be obvious, on a little reflection, that it has the effect in nearly every case—practically in all cases—of exonerating the company, no matter how great its negligence may be. Suppose, for instance, that one word has been substituted for another, so as to make the message, as delivered to the addressee, essentially different from the message as delivered to the operator to be sent, how can the unlucky sender ever prove, beyond the fact that the substitution was made, that it was done by the negligence—much less by the *gross negligence*, according to the rule in some courts,—of the servants of the telegraph company? By what *other evidence* shall he negative the conclusion, absurd on its face, that the mistake may have been due to “atmospheric conditions?” Or, if it were practical, in a supposed case, to prove that an error in transmitting a dispatch happened through the negligence of some of its operators, and not in consequence of atmospheric conditions, how could the luckless plaintiff ever find out what operator or operators had charge of the transmission of his particular message? But if he should chance to find the one, how could he fasten on him the imputation of negligence by his own testimony? Would any such operator give a deposition to the effect that he had misread the message? These considerations show that the rule that the plaintiff must prove negligence by other evidence than the fact of the mistake, is tantamount, in nearly every case, to depriving him of all remedy, no matter how gross the negligence of the defendant may, in fact, have been. The strange manner in which the courts have dealt with this question is strikingly illustrated by a case which

holds that the telegraph company is liable for the failure to use *ordinary care*, and which, at the same time, refuses to permit the plaintiff to prove the want of ordinary care by evidence, which, in other situations, is ordinarily sufficient in law for that purpose.¹ In this discussion, the reader need scarcely be cautioned that the term "evidence of negligence" has reference only to the sufficiency of the evidence as matter of law; that is, it does not mean that it is conclusive, but only that, where the plaintiff produces it, he is entitled to have the case go to the jury.

§ 223. **Excuses Mistakes not Arising from Gross Negligence.**—In the earliest case on the subject,² there is a *dictum* to the effect that it is competent for such a company to establish regulations limiting its liability for all mistakes consequent upon the sender of the message not paying for having it repeated, except those arising from *gross* negligence; and several American courts, with this case apparently in mind, have stated the rule to be, that while such companies may establish reasonable regulations, they cannot make rules relieving themselves from liability for the gross negligence of their agents. The view of these courts, substantially, is that such stipulations will relieve the company, in

¹ Sweetland v. Illinois, etc. Tel. Co., 27 Iowa, 433; s. c., 1 Am. Rep. 285. See also Manville v. Western Union Tel. Co., 37 Iowa, 244; s. c., 18 Am. Rep. 8. In the former of these cases, three propositions are understood to have been decided: 1. That such a stipulation as the one under discussion is a reasonable one. 2. That it does not exonerate the company from the obligation of using *ordinary or reasonable care*. 3. But that the plaintiff must show a failure to use ordinary or reasonable care by other evidence than the failure to transmit the message correctly. The cunning lawyer who devised the stipulation on the message blank could ask for no better rule.

² McAndrew v. Electric Tel. Co., 17 C. B. 3.

case the dispatch is not repeated, from liability for a failure in the undertaking of the company, which might have sprung from not repeating the message, where such failure is not caused by *gross negligence*, *willful misconduct* or *bad faith* of the company or of its agents.¹ But, as already suggested,² the expression "gross negligence" is believed to convey to the mind no accurate legal conception.³ It was stated by Mr. Baron Rolfe, that what is termed gross negligence is no more than ordinary negligence with an epithet;⁴ and courts have frequently denied the soundness of the distinction between ordinary negligence and gross negligence.⁵ The distinction seems to be destitute of any practical value in the administration of justice, except in those cases where, under a rule such as prevails in Illinois and Georgia, the negligence of two persons, concurring to produce the same accident, are

¹ *McAndrew v. Electric Tel. Co.*, 17 C. B. 3; s. c., 33 Eng. I. & Eq. 180; *Hart v. Western Union Tel. Co.*, 66 Cal. 579; s. c., 6 West. Coast Rep. 195; *Allen Tel. Cas.* 390; *Ellis v. American Tel. Co.*, 13 Allen (Mass.), 226; s. c., Allen Tel. Cas. 306; 17 Am. Rep. 69; *Redpath v. Western Union Tel. Co.*, 112 Mass. 71; s. c., 17 Am. Rep. 69; *Grinnell v. Western Union Tel. Co.*, 113 Mass. 299; s. c., 18 Am. Rep. 485; *Clement v. Western Union Tel. Co.*, 137 Mass. 463; s. c., 24 Am. L. Reg. 328; *Carew v. Western Union Tel. Co.*, 15 Mich. 525; s. c., Allen Tel. Cas. 345; 2 Thomp. Neg. 829; *Wann v. Western Union Tel. Co.*, 37 Mo. 472; s. c., Allen Tel. Cas. 261; *Backer v. Western Union Tel. Co.*, 11 Neb. 87; s. c., 38 Am. Rep. 356; *Breese v. United States Tel. Co.*, 45 Barb. (N. Y.) 274; s. c., affirmed, 48 N. Y. 132; s. c., 8 Am. Rep. 526; Allen Tel. Cas. 663; *Lassiter v. Western Union Tel. Co.*, 89 N. C. 334; *Passmore v. Western Union Tel. Co.*, 9 Phila. (Pa.) 90; s. c., affirmed, 78 Pa. St. 238; *Womack v. Western Union Tel. Co.*, 58 Tex. 176; s. c., 44 Am. Rep. 614; *Western Union Tel. Co. v. Catchpole, White & W. (Tex.)*, 268; *Baxter v. Dominion Tel. Co.*, 37 Up. Can. Q. B. 470; *Camp v. Western Union Tel. Co.*, 1 Metc. (Ky.) 164.

² *Ante*, § 140.

³ *Alken v. Telegraph Co.*, 5 S. C. 358, 378.

⁴ *Wilson v. Brett*, 11 Mees. & W. 113, cited with approval by Willes, J., in *Grill v. General, etc. Collier Co.*, L. R. 1 C. P. 600, 612.

⁵ *Sherm. & Redf. on Neg.*, Sec. 16.

brought into *comparison* with each other.¹ In the leading case in Iowa, already alluded to,² it is asserted that such a company cannot make rules relieving itself from liability for a failure to exercise *ordinary care*. It has been held gross negligence in a telegraph company, to have in its employ an operator who did not know of the existence of a town adjoining the county-seat of a neighboring county, in consequence of which the dispatch was sent to another town and lost.³

§ 224. **This View as Understood in Massachusetts.**—The blank forms, on which messages of the Western Union Telegraph Company were transmitted, contained the following condition: “To guard against mistakes, the sender of a message should order it *repeated*, that is, telegraphed back to the original office. For repeating, one-half the regular rate is charged in addition. And it is agreed between the sender of the following message and this company, that the said company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery of any *unrepeated message*, beyond the amount received for sending the same, nor for mistakes or delays in the transmission or delivery, or

¹ In North Carolina, where the so-called doctrine of “comparative negligence” is understood not to have obtained, this idle distinction between ordinary negligence and gross negligence is kept up, and appears in a holding to the effect that a telegraph company may exempt itself from liability for *ordinary negligence* in sending unrepeated messages, but not against *gross negligence*. Pegram v. Western Union Tel. Co., 97 N. C. 57. And the same court has held that he cannot even recover the cost of the message, where the terms of the contract exempt the company from liability, without proof of negligence. Thompson v. Western Union Tel. Co., 106 N. C. 549; s. c., 11 S. E. Rep. 269; 30 Am. & Eng. Corp. Cas. 634.

² Sweetland v. Illinois, etc. Tel. Co., 27 Iowa, 433, 452.

³ Western Union Tel. Co. v. Buchanan, 35 Ind. 429.

for non-delivery of any repeated message beyond fifty times the sum received for sending the same, unless specially insured; nor in any case for delays arising from unavoidable interruption in the working of their lines, or for errors in cipher or obscure messages. And this company is hereby made the agents of the sender, without liability, to forward any message over the lines of any other company, when necessary to reach its destination. Correctness in the transmission of messages to any point on the lines of this company can be *insured* by contract in writing, stating agreed amount of risk, and payment of premium thereon at the following rates, in addition to the usual charge for repeated messages, viz: one per cent. for any distance not exceeding 1,000 miles, and two per cent. for greater distance. No employee of the company is authorized to vary the foregoing. The company will not be liable for damages in any case where the claim is not presented in writing within sixty days after sending the message." It has been held that the above condition exonerates the telegraph company from *ordinary care, attention and skill* in the transmission of unrepeated messages, but leaves them liable only in case they have been guilty of fraud or *gross negligence*, or where the error is of such a character that the company cannot legally contract for its own protection against liability for it, on such terms as the printed condition contains—the court not stating what errors will be of this character.¹ In the earlier case there is a declaration of Chief Justice Bigelow to the effect that it would be a question of fact for the jury

¹ Redpath v. Western Union Tel. Co., 112 Mass. 71; s. c., 17 Am. Rep. 69; Ellis v. American Tel. Co., 13 Allen (Mass.), 226.

whether the mistake in the dispatch would have been prevented or corrected by repeating it;¹ but it was distinctly ruled in a subsequent case in that court, that this was not the law, and that evidence is not admissible that the repetition of the dispatch would not have disclosed the error; "since the plaintiff, having omitted to fulfill the condition on which alone, by the terms of the contract between the parties, he could recover for any mistake in transmission more than the amount of his original payment, cannot be permitted to prove that his own failure to fulfill the contract did not affect the result."²

§ 225. **Further of the Massachusetts Doctrine.**—In a still later case in the same State, it has been held that such a stipulation as that above set out, avoids liability for an *unexplained delay* in delivering the message, on the part of the messenger boy of the company, to whom it was, after its receipt at the office to which it was telegraphed, entrusted for delivery. It is fair to the court so holding, to state the reasoning upon which this extraordinary decision was made. MORRIS, C. J., in giving the opinion of the court, said: "It may be that the company might be guilty of some fraudulent or gross negligence in transmitting or delivering a message, so that it would not be protected by its regulation from liability for the actual damages, though in excess of the sum stipulated. But the negligence of the messenger boys, in delivering messages, was plainly contemplated by the parties when they entered into the stipulation; and there are no principles of public policy which would prevent the company from stip-

¹ *Ellis v. American Tel. Co.*, 13 Allen, 226, 238.

² *Grinnell v. Western Union Tel. Co.*, 113 Mass. 299, 306.

ulating that it will not be responsible for such negligence beyond a fixed amount, unless it receives a reasonable compensation for assuming further responsibility.”¹ It is submitted to the profession, that there is no sense whatever either in this conclusion or in this reasoning. Plainly, such a stipulation should be allowed to excuse only those mistakes or delays which may be shown to be due to the failure to have the message repeated, such as, having regard to the imperfections of telegraphy, might be regarded as due proximately to such failure. The repeating of the message back to the office from which it was sent, would have no tendency whatever to stimulate the diligence of the messenger boy, in carrying a copy of it from the office to which it was sent to the residence or place of business of the person addressed.

§ 226. **The Same View taken in New York.**—The same view has been taken in New York, as will appear from a late case, in which it appeared that the plaintiff had, for many years, extensively used the defendant’s blanks in sending telegrams, and was familiar with their contents. These blanks had printed at the top, a provision that the company should not be liable for mistakes, *delays* or the *non-delivery* of any unrepeatd message, beyond the amount received for sending the same, and at the bottom, a notice calling attention to the agreement. In an action to recover damages for failure to deliver a message written upon one of these blanks, and delivered by the plaintiff to one of the defendant’s operators, and sent by him, which the plaintiff had

¹ *Clement v. Western Union Tel. Co.*, 137 Mass. 463; s. c., 24 Am. L. Reg. 328.

not ordered to be repeated, it was not shown why the message did not reach its destination, nor was it shown that the failure to deliver was due to the willful misconduct or gross negligence of the defendant. The court held that the case was within the letter and purpose of the stipulation, to which plaintiff must be held to have assented, and that he was only entitled to recover the amount paid by him for the sending of the message.¹

§ 227. **This Rule as Understood in Kentucky.**—In Kentucky, it has been held that a regulation of a telegraph company that it will not be responsible for mistakes in transmitting a message, unless the same is repeated and an additional sum paid therefor, is just and reasonable, and that a person who, having notice of such regulation, sends a message without having it repeated, is to be regarded as having sent it *at his own risk*.² It has been said of such a regulation, by the Court of Appeals of Kentucky, speaking through SIMPSON, J.: "The public are admonished by the notice that, in order to guard against mistakes in the transmission of messages, every message of importance ought to be repeated. A person desiring to send a message is thus apprised that there may be a mistake in its transmission, to guard against which it is necessary that it should be repeated. He is also notified that if a mistake occur, the company will not be responsible for it unless the message be repeated. There is nothing unreasonable in this condition. It gives the party

¹ *Kiley v. Western Union Tel. Co.*, 109 N. Y. 231; s. c., 16 N. E. Rep. 75.

² *Camp v. Western Union Tel. Co.*, 1 Metc. (Ky.) 164; s. c., 71 Am. Dec. 461.

sending the message the option to send it in such a manner as to hold the company responsible, or to send it for a less price at his own risk. If the message be unimportant, he may be willing to risk it without paying the additional charge. But if it be important, and he wishes to have it sent correctly, he ought to be willing to pay the cost of repeating the message. This regulation, considering the accidents to which the business is liable, is obviously just and reasonable. It does not exempt the company from responsibility, but only fixes the price of that responsibility, and allows the person who sends the message either to transmit it at his own risk, at the usual price, or by paying in addition thereto half the usual price, to have it repeated, and thus render the company liable for any mistake that may occur. The plaintiff must, therefore, be regarded as having sent the message in this case at his own risk, inasmuch as he failed to have it repeated, and consequently the company was not liable for the mistake.'"²

§ 228. **View that Condition as to Repetition Exonerates only from Liability for Errors Preventible by Repeating.**—There is, however, a class of cases which proceed on views much more consonant with common sense and justice, in holding that where the repetition of the message would not have prevented the damage complained of, the company will not be protected from liability by reason of the failure of the sender to have it repeated.³ Such a pro-

² *Camp v. Western Union Tel. Co.*, 1 Metc. (Ky.) 164; s. c., 71 Am. Dec. 461, 463.

³ *Western Union Tel. Co. v. Graham*, 1 Colo. 230; s. c., 9 Am. Rep. 136; 10 Am. L. Reg. (N. Y.) 319; *Western Union Tel. Co. v. Fenton*, 52 Ind. 1; *Birney v. New York, etc. Tel. Co.*, 18 Md. 341; s. c., 81 Am.

ceeding would not, for instance, have any tendency to prevent a negligent *delay* in delivering a message, or a negligent failure to deliver it at all. These courts, therefore, held that such a stipulation will not be allowed to operate so as to excuse a negligent delay in delivering, or a negligent non-delivery.¹ For stronger reasons, it would not excuse a total *failure to deliver* it.² If the message is unreasonably delayed, or not delivered at all, actual damages may be recovered, notwithstanding a stipulation in the telegraph blank that only the cost of transmission is recoverable. For like reasons, a condition in a telegraph blank relieving the company from liability for mistakes or delays in the transmission of unrepeatd messages, and exempting it from liability for errors in transmitting cipher or obscure messages, does not limit its liability for *failure to transmit* a *cipher* message from the receiving office.³ A rule

Dec. 607, 612; *Ellis v. American Tel. Co.*, 13 Allen (Mass.), 226, 238; s. c., Allen Tel. Cas. 306; *Sprague v. Western Union Tel. Co.*, 6 Daly (N. Y.), 200; *Bell v. Dominion Tel. Co.*, 25 L. Can. Jur. 248; s. c., 3 Montr. Leg. News, 406.

¹ *True v. International Tel. Co.*, 60 Me. 9, 18, per Kent, J.; *Manville v. Western Union Tel. Co.*, 37 Iowa, 214; *Western Union Tel. Co. v. Fenton*, 52 Ind. 1, 5; *Baldwin v. United States Tel. Co.*, 54 Barb. (N. Y.) 505; s. c., 1 Lans. 125; 6 Abb. Pr. (N. S.) 195 (reversed on other grounds, 45 N. Y. 744); *Sprague v. Western Union Tel. Co.*, 6 Daly (N. Y.), 200; *New York, etc. Tel. Co. v. Dryburg*, 35 Pa. St. 298; *Western Union Tel. Co. v. Broesche*, 72 Tex. 654; s. c., 10 S. W. Rep. 734; *Thompson v. Western Union Tel. Co.*, 64 Wis. 531; s. c., 54 Am. Rep. 644; *Thompson v. Western Union Tel. Co.*, 107 N. C. 449; s. c., 12 S. E. Rep. 427. Compare: *Thompson v. Western Union Tel. Co.*, 106 N. C. 549; s. c., 30 Am. and Eng. Corp. Cas. 634; 11 S. E. Rep. 269.

² *Gulf, etc. R. Co. v. Willson*, 69 Tex. 739; s. c., 7 S. W. Rep. 653; *Western Union Tel. Co. v. Graham*, 1 Colo. 230; *Western Union Tel. Co. v. Henderson*, 89 Ala. 510; s. c., 30 Am. and Eng. Corp. Cas. 615; 7 South. Rep. 419; *Western Union Tel. Co. v. Broesche*, 72 Tex. 604; s. c., 10 S. W. Rep. 734.

³ *Western Union Tel. Co. v. Way*, 83 Ala. 542; s. c., 4 South. Rep. 844.

which stipulates that unless a message is repeated a company will not be liable for failing to *deliver* it, is therefore an *unreasonable rule*, because it is an attempt on the part of the company to stipulate against liability for its own negligence.¹

§ 229. *Illustrations of this View.*—Thus, where the exemption was contained in a printed regulation posted in the company's office, by which the public were informed that the company would not be liable for any loss or damage that might ensue, "by reason of any delay or mistakes in the transmission or delivery, or from non-delivery, of any unrepeatd messages," etc., it was said: "It is manifest that the terms of the notice neither embrace nor declare an exemption from liability in a case where no effort is made by the company, or its agents to *put a message on its transit*. The exemption from liability for the non-transmission and non-delivery of unrepeatd messages, provided for by the rules contained in the notice, does not, in our opinion, in any way embrace or affect this case. The terms of the notice in which exemption from liability is declared clearly imply an obligation on the part of the company to attempt the transmission and delivery of a message received by it for that purpose, and it would be most unreasonable to permit it to have the benefit of an exemption from liability without first bringing itself within the scope of the exemption provided for, by a full and faithful performance of its implied duties. While we give full force and effect to the rules and regulations of the appellee in a legal construction of them, we deem it unjust to the appellant to extend that effect beyond the actual

¹ *Western Union Tel. Co. v. Fenton*, 52 Ind. 1, 6.

terms adopted by the appellee to secure its exemption." ¹ So, where the gist of the action was the *failure to deliver* the message, it was held that such a stipulation could not operate to exonerate the company from liability for the *actual damages*, since the safe delivery of the message at the other end of the line would not be insured by repeating it. "The gist of the action," said BELFORD, J., "is the failure to deliver the message. The complaint is not that the message was incorrectly sent, or that it was inaccurately taken off the wires at Nebraska City. If this was the gravamen of the action, we might hold, with the Kentucky and Massachusetts courts, that it was the duty of the plaintiff to insure its accuracy by having it repeated. But how could the failure to deliver the message be avoided by paying for having it repeated? Can it be said that the operator at the other end of the line could insure the safe delivery of a message by repeating, when the negligence which occasioned the failure occurred after the receipt of the message? The object of repeating a message is to correct errors, and not to avoid delays in delivering it. After transmission, an incorrect message could be sent out and delivered as speedily as if it had been verified and proved to be perfectly accurate. Delays in the delivery of a message result from causes altogether different from those which produce mistakes in transmission, and it is reasonable that rules of limitation or exemption should be adapted to the nature of the case." ²

¹ *Birney v. New York, etc. Tel. Co.*, 18 Md. 341; s. c., 81 Am. Dec. 607, 612.

² *Western Union Tel. Co. v. Graham*, 1 Colo. 230; s. c., 9 Am. Rep. 136, 139. To the same effect is *Bryant v. American Tel. Co.*, 1 Daly (N. Y.), 575. It is said in a note in 9 Am. Rep. 149, that this last case was

Another court has reasoned that such a stipulation as to the repeating of the message will not excuse an *entire failure to send it*,—that not being “a mistake or delay in the transmission or delivery, or a non-delivery,” of the message, within the meaning of the language creating the exemption.¹

§ 230. *Illustrations Continued.*—So, where a message, as written and delivered to the agent of the company read, “Send * * * two *hand* bouquets,” and the message as delivered read, “Send two *hundred* bouquets,” and it appeared that the error was not due to any imperfect transmittal of the message over the wires, but to a mistake of the clerk who received it, who, supposing the word “*hand*” to be *hund*, and to have been intended as an abbreviation of the word hundred, added to it the three letters r-e-d, it was held that the company was liable for the damages sustained by the person to whom the message was sent, although there was on the blank on which the sender had written it the following condition: “The company will not be liable for any loss or damage that may ensue by reason of any delay or mistake in the transmission or delivery, or from non-delivery, of unrepeatd messages, but only engages to use reasonable efforts to secure the services of competent and reliable employees, so as to have their business transacted in good faith.”² Again, where a message, written on a blank containing such a stipulation, was addressed to E. W. Manville, but was translated by the operator S. Manville, and, after having been received at

reversed in the New York Court of Appeals, but only by reason of default.

¹ Sprague Western Union Tel. Co., 6 Daly (N. Y.), 200.

² New York, etc. Tel. Co. v. Dryburg, 35 Pa. St. 299.

the terminal office, was not placed in the hands of the company's messenger for delivery for three days, but was when placed in the hands of the messenger, delivered to the right person, it was held that the company was responsible for the resulting damages, although the person for whom it was intended had called for it on the day it was received, and would have received it if it had been repeated according to the terms of the printed conditions of the blank on which it was sent; since, if the operator had not been negligent in not delivering the message to the company's messenger when it was received, the delay would not have occurred, notwithstanding it was wrongly addressed.¹ In another case the plaintiff sent a message by the defendant's telegraph line, written upon a blank furnished by the defendant company containing a printed condition that the defendant would not be "responsible for any error or delay in the transmission of any unrepeatable message," without the payment of additional charges. The message directed the sale of 100 shares of stock. It was transmitted so as to direct the sale of 1,000 shares, and was not repeated. In an action against the telegraph company for damages, it was held that the condition of the message did not relieve the company from liability for errors arising from its own negligence; that the error was *prima facie* evidence of the defendant's negligence, and that the measure of damages was the amount paid by the plaintiff by reason of an advance in the price of stock to replace the excess of nine hundred shares sold in obedience to the erro-

¹ *Manville v. Western Union Tel. Co.*, 37 Iowa, 214.

neous message.¹ In another case the message blank contained a similar stipulation, and the message, when delivered to the company, was placed among the messages to be sent, and when it was reached it was taken by the defendant's operator, who called the office to which it was to be transmitted, and found the wire in use. While waiting, his attention was engaged elsewhere, and he placed the message among the messages that had been sent, and it was not sent until a week later. It was held that this was gross negligence, and therefore the contract did not limit plaintiff's recovery to the amount paid for transmission.²

§ 231. **Cases of Exoneration Under this Rule.**— Under the operation of this rule, where there is a stipulation on the blank on which the message is sent, to the effect that the company shall not be liable beyond a stated amount unless the dispatch is repeated at the cost of the sender, the company will not be responsible for an error in taking down and transmitting the dispatch at the other end of the line;³ as, where a dispatch ordering the purchase of \$700 in gold, was taken down and delivered "\$7,000 in gold;"⁴ or where it ordered whisky at sixteen cents per gallon, instead of fifteen cents;⁵ or where it ordered the person to whom it was sent to ship by *rail* instead of by *sail*;⁶ or where

¹ Tyler v. Western Union Tel. Co., 60 Ill. 421; s. c., 14 Am. Rep. 38.

² Mowry v. Western Union Tel. Co., 51 Hun (N. Y.), 126; s. c., 4 N. Y. Supp. 686.

³ Ellis v. American Tel. Co., 13 Allen (Mass.), 226; Camp v. Western Union Tel. Co., 1 Metc. (Ky.) 164; s. c., 6 Am. L. Reg. 443; Wann v. Western Union Tel. Co., 37 Mo. 472.

⁴ Breese v. United States Tel. Co., 45 Barb. (N. Y.) 274.

⁵ Camp v. Western Union Tel. Co., *supra*.

⁶ Wann v. Western Union Tel. Co., *supra*.

it was delivered so as to read, "I *sold* the Tibbs contract," instead of "I *hold* the Tibbs contract."¹ A message was subject to a condition similar to that already quoted, and no extra fees were paid for repeating it. It was a direction to send "ten men \$125." As delivered it read "ten men \$175." The court instructed the jury that, notwithstanding the terms and conditions set forth, the defendants were bound to make use of ordinary care, attention and skill, and were liable to damages arising from inattention or carelessness in the transmission of the message, either to the sender or to the receiver, according to their respective interests in the message; and that the error in the message was *prima facie* evidence of want of ordinary care, attention and skill on the part of the defendants. A verdict was returned for the plaintiff, which was set aside by the supreme judicial court as erroneous, the court holding that the liability of the telegraph company was not like that of a common carrier, and that the printed conditions limiting this liability were reasonable and valid.² In an English case, the message was sent subject to the condition that "this company will not be responsible for mistakes in the transmission of unrepeatd messages, from whatever cause they may arise." In the transmission of a message, which was unrepeatd, the word "Southampton" was substituted for the word "Hull." The message was accordingly sent to the wrong town. In an action against the company for damages, the

¹ Passmore v. Western Union Tel. Co., 78 Pa. St. 238 (affirming s. c., 9 Phila. (Pa.) 90).

² Ellis v. American Tel. Co., 13 Allen (Mass.), 226.

court held that the condition was a reasonable one, and that the plaintiff could not recover.¹

§ 232. *Continued.*—A message directed to "Owego, N. Y.," was erroneously sent to "Oswego, N. Y." It contained the stipulation quoted in the preceding section. As there was nothing in the facts of the case from which it could be inferred that the telegraph company had been guilty of *fraud* or *gross negligence*, or that the error was of such a character that the company could not legally contract for its own protection against liability for it, on such terms as the printed conditions contained, it was held that the sender could not recover damages.² So, where the stipulation on the message blank was, "To guard against *mistakes* or delays, the sender of the message should order it repeated," etc.; and the message read: "If not already, close out my Decembers," and was correctly transmitted to the first repeating office, but was from some cause unknown delivered to the person addressed, reading as follows: "If not already, closed out my Decembers," there being no other evidence of negligence than arose from the fact of this error in transmission, it was held, confirming the trial court, that the company was liable only for the sum paid for sending the message, with interest.³ Where the contract printed at the top of a telegraph blank limited liability for negligence or delay in transmitting an *unrepeated* message to the amount paid for its transmission, and a repeated message to fifty times the amount paid,

¹ *MacAndrew v. Electric Tel. Co.*, 17 C. B. 3.

² *Redpath v. Western Union Tel. Co.*, 112 Mass. 71; s. c., 17 Am. Rep. 69.

³ *Womack v. Western Union Tel. Co.*, 58 Tex. 176; s. c., 44 Am. Rep. 614.

the limitation was held reasonable and binding on one accustomed to read such blanks, and it was held error to refuse to limit recovery to \$12.50 for error in a twenty-five cent message requesting a certain *horse* to be shipped, which, on receipt, read *horses*, and which the receiver made some attempt to have repeated.¹

§ 233. **Releases Liability for Mistakes of Connecting Line.**—It is clear that, under the operation of this rule, a company receiving a message which it is to transmit without repeating, where its regulations stipulate against liability in case messages are not repeated, will not be liable to the sender if the message is lost, or transmitted incorrectly, through the negligence of the agents of a *connecting line* over which it is obliged to send it.²

§ 234. **But does not Exonerate Connecting Line.**—On the other hand, it has been held that a stipulation on the blank on which a telegraphic message is sent, that the company will not be liable beyond a given amount unless the message is repeated, can be invoked only by the company which receives the message for transmittal; that a connecting line to which the message is delivered cannot avail itself of it as a defense against the consequences of errors that would not have happened if the message had been repeated; and that such a stipulation can be invoked only against the sender of the message, not against any other person; “for it is his message, his language that is to be transmitted, and it is only known to the receiver when delivered and as deliv-

¹ Bennett v. Western Union Tel. Co., 18 N. Y. State Rep. 777; 2 N. Y. Supp. 365.

² Western Union Tel. Co. v. Carew, 15 Mich. 525; 2 Thomp. Neg. 828; De La Grange v. Southwestern Tel. Co., 25 La. An. 383; Post, § 262.

ered. He is to be guided and informed by what is delivered to him, and has no opportunity to agree upon any such condition before delivery."¹

§ 235. **Simpler View that Such Stipulations are Void.**—A simpler and sounder view is that a stipulation in the message blank of a telegraphic company that it will not be liable for mistakes or delays in transmission, delivery, or non-delivery of unrepeatd messages, whether happening by the negligence of its servants or otherwise, beyond the amount received for sending the message,² is void, as against public policy.³ These cases take the simpler and sounder view that such a stipulation cannot, on grounds of public policy and justice, be allowed to operate so as to relieve the telegraph company from a responsibility for the negligence of its agents and servants. The simpler and more direct expression of this rule is void; since, as already suggested, in so far as it operates to relieve the company from the consequences of atmospheric disturbances and other unavoidable circumstances, it does no more than the law does without it; so that, in so far as it has any operation at all, it operates only to relieve the company from the consequences of its own negligence. The analogous rule touching the liabilities of *common carriers*, as agreed upon in most, if not all of the American courts, is, that a common carrier can-

¹ De La Grange v. Southwestern Tel. Co., 25 La. An. 383.

² The present stipulation in the message blanks of the Western Union Telegraph Company.

³ Ayer v. Western Union Tel. Co., 79 Me. 493; s. c., 1 Am. St. Rep. 353; Tyler v. Western Union Tel. Co., 60 Ill. 421; s. c., 14 Am. Rep. 38; Western Union Tel. Co. v. Tyler, 74 Ill. 168; s. c., 24 Am. Rep. 279; Western Union Tel. Co. v. Blanchard, 68 Ga. 299; s. c., 45 Am. Rep. 480; Western Union Tel. Co. v. Short, 53 Ark. 434; s. c., 9 L. R. A. 744; 9 Rail. and Corp. L. J. 11; 14 S. W. Rep. 649.

not, by a special contract with the shipper, exonerate himself from liability for loss or damage caused by the negligence of himself or his servants.¹ The writer is not aware of any decisions which employ, in connection with this rule in respect of common carriers, the expression "gross negligence," though possibly such may be found. Why a telegraph company should enjoy the benefit of a more favorable rule of law than that which is accorded to a railway company, or other common carrier exercising an analogous employment, has not been and cannot be judicially explained.

§ 236. **Reasons given for this View.**—The following cogent reasons were given for this view by the Supreme Court of Illinois, in an opinion delivered by Mr. Justice BREESE: "If it be a contract, the sender entering into it was under a species of moral duress. His necessities compelled him to resort to the telegraph as the only means through which he could speedily transact the business in hand, and was compelled to submit to such conditions as the company, in their corporate greed, might impose, and sign such a paper as the company might present. 'Prudential rules and regulations,' such as the company is authorized by statute to establish, cannot be understood to embrace such regulations

¹ *Swindler v. Hilliard*, 2 Rich. L. (S. C.) 286; *United States Exp. Co. v. Backman*, 28 Ohio St. 144, 155; *Union Exp. Co. v. Graham*, 26 Ohio St. 595; *Graham v. Davis*, 4 Ohio St. 362; *Welsh v. Railroad Co.*, 10 Ohio St. 65; *Railroad Co. v. Curran*, 19 Ohio St. 1; *Berry v. Cooper*, 28 Ga. 543; *Farnham v. Camden, etc. R. Co.*, 55 Pa. St. 53; *Grogan v. Adams Exp. Co. (Pa.)*, 5 Cent. Rep. 298; *Lamb v. Camden, etc. R. Co.*, 46 N. Y. 271; *American Exp. Co. v. Sands*, 55 Pa. St. 140; *Southern Exp. Co. v. Moon*, 39 Miss. 822; *The City of Norwich*, 4 Ben. (U. S.) 271; *Black v. Goodrich Transp. Co.*, 55 Wis. 319; *Chicago, etc. R. Co. v. Abels*, 60 Miss. 1017; *Kansas City, etc. R. Co. v. Simpson*, 30 Kan. 645; *Moulton v. St. Paul, etc. R. Co.*, 31 Minn. 85.

as shall deprive a party of the use of their instrumentality, save by coming under most onerous and unjust conditions. But it is said, a special agreement might have been made for insurance, in writing. To do this, the amount of risk must be specified on the contract, and paid at the time of sending the message; and as there is but one person in the world, a superintendent, authorized to make a contract of insurance, he must be hunted up and the terms negotiated—all which requires time—and a favorable opportunity to the sender be irretrievably lost. At Chicago, or other large cities, where a superintendent is supposed to be, there might not be much loss, but we are declaring the law for the whole State, and it is well known that at subordinate, though important stations, on telegraph lines, superintendents are not to be found; this provision is to such perfectly valueless. As a party, repeating a message, and paying fifty per cent. additional therefor, cannot recover of the company to the extent of his loss, we are free to say such a contract, forced, as we have shown it is, upon the sender, is, in our opinion, unjust, unconscionable, without consideration and utterly void.”¹ In enforcing the same view, the Supreme Court of Georgia has said: “Any rule or regulation of the company which seeks to relieve it from performing its duty belonging to the employment with integrity, skill and diligence, contravenes public policy as well as the law, and under it the party at fault cannot seek refuge. If it become necessary for the company, in transmitting

¹ *Tyler v. Western Union Tel. Co.*, 60 Ill. 421; s. c., 14 Am. Rep. 38, 51. The doctrine of this case was reaffirmed in *Western Union Tel. Co. v. Tyler*, 74 Ill. 168; s. c., 24 Am. Rep. 279.

messages with integrity, skill and diligence, to secure accuracy, to have said messages repeated, then the law devolves upon them that duty, to meet its requirements. We know of no law in this State that limits their tolls on messages; this is under their own control. A message must be transmitted with integrity, skill and diligence, and the mode of attaining accuracy in such work they have at their command; the compensation paid therefor the law does not seek to limit or restrict.”¹

§ 237. **Receiver of Message under no Obligation to have it Repeated.**—The right of action established in the receiver of the message, or, where it is never delivered, in the person to whom it is addressed,² has given rise to another question, where the action is brought by such person and where the message which was sent contained the stipulation already referred to,³ in respect of having the message repeated back. In such a case, is the receiver of the message bound by the stipulation, assuming that the sender was bound by it? If the right of action which the receiver has against the company rests upon privity of contract and depends upon the circumstance that the sender was his agent,—in other words, if the contract with the telegraph company was the contract of the receiver, through his agent the sender, then, on the most unshaken grounds, the receiver would be bound by this condition, if the circumstances were such that it would bind the sender. Moreover, if the receiver’s right of action rests upon the doctrine which exists in America,

¹ *Western Union Tel. Co. v. Blanchard*, 68 Ga. 299; s. c., 45 Am. Rep. 480, 484, opinion by Speer, J.

² *Post*, § 426.

³ *Ante*, § 224.

especially in those States where modern codes of procedure have come into vogue, that a third party for whose benefit a contract has been made may maintain an action thereon to enforce its covenants, then he would be equally bound by the stipulations, unless known to or assented to by him. But several cases are found where the courts, without proceeding upon any definite or consistent ground, have held that the stipulation in regard to repeating is not binding upon the person to whom the message is sent. The Supreme Court of Louisiana say: "The proposition that the defendants are liable, if at all, only in case the message is repeated, as contained in the printed conditions, can be invoked only against the sender of the message, if against any. The receiver can be guided or informed solely by what is delivered to him, and has no opportunity to agree upon any such condition before delivery."¹ If the telegraph company, when it delivers an erroneous message to the person to whom it has been addressed by the sender, puts itself in the condition of a mere tort-feasor, one guilty of a mere *misfeasance* toward a stranger, by which that stranger has incurred a loss, then this conclusion is supportable. This seems to have been the view of a court in Pennsylvania, where there was on the message blank the usual condition in regard to repeating, and where the message was wrongly transmitted, and the receiver sued for damages. The court say: "Two questions arise in this case: First, was there sufficient notice brought home to the plaintiff as to the regulations

¹ Lagrange v. Southwestern Tel. Co., 25 La. An. 383. Compare Aiken v. Telegraph Co., 5 S. C. 358.

as to repetition of messages? Secondly, if so, was the plaintiff in this action bound by such notice? As to the first point, we are of opinion that the notice was not sufficient. The defendant delivered to plaintiff a wrong message, and the jury have found that the error was caused by the defendant's negligence. The defendant, therefore, is in the position of a *wrong-doer*, and a notice, to excuse him, must be so full, clear and explicit that it would be negligence in the plaintiff to disregard it. The notice proved was only a notice that there were regulations of the company, and that they had been agreed to by the sender of the message. Not the slightest specification is given of the nature of the regulations, nor any caution to the receiver of the message that they might be important for him to examine. We cannot say that there was anything in such a notice that put the plaintiff upon inquiry or caution at his peril. As the first point is decisive in the plaintiff's favor, we are not called upon to decide the second. But we may say that, treating this action as purely in tort for misfeasance, it would seem upon principle that the plaintiff could not be bound by such notice.'" The Supreme Court of the same State seems to have proceeded upon this view in an earlier case,¹ where, in giving the opinion of the court, it is said by WOODWARD, J.: "This company charge fifty per cent. advance upon the usual price of transmission, where the sender demands that the message be repeated back to the first operator, and Leroy [the sender]

¹ *Harris v. Western Union Tel. Co.*, 9 Phila. (Pa.) 88.

² *New York, etc. Tel. Co. v. Dryburg*, 35 Pa. St. 298, 303; s. c., Allen Tel. Cas. 157; 78 Am. Dec. 338.

did not pay it. If it be granted that, in consequence of his not purchasing this security against mistakes, *he* could not hold the company liable, it does not follow that Dryburg [the person addressed] cannot. He did not know whether the message had been repeated back to Leroy or not." Another court has distinctly ruled that it is not *contributory negligence* in the receiver of the message not to telegraph back to ascertain whether it has been correctly transmitted, for the reason that "the company was bound to send the message correctly in the first instance."¹

§ 238. **What Amounts to a Request to have the Message Repeated.**—The disposition of the courts to relieve the public from the consequences of these unconscionable engagements of telegraph companies is shown in an action for the negligent transmission of a message, where it appeared that plaintiff went at once to the operator, and requested him to ask the sender whether it was "five six" or "five sixty;" and the court held that this amounted to a request by plaintiff to have the message repeated, and that it was immaterial that the *forms* established by defendant for the repetition of messages were not complied with.²

§ 239. **Waiver of Such Stipulation a Question for Jury.**—Whether a telegraph company, by *orally* receiving and delivering messages relating to oil-market quotations, where the exigencies do not give time to write the messages, intends to relieve its

¹ Tyler v. Western Union Tel. Co., 60 Ill. 421; s. c., 14 Am. Rep. 38, 47. See also De Rutte v. New York Tel. Co., 30 How. Pr. (N. Y.) 403, 416.

² Western Union Tel. Co. v. Landis (Pa.), 12 Atl. Rep. 467, s. c., 21 W. N. C. 38.

patrons from the stipulation contained in its printed blanks, is a question for the jury.¹

§ 240. **Such Stipulations Apply only to the Message—not to the Date.**—Stipulations requiring a telegram to be repeated in order to make the company liable for errors, have been held not to apply to the *name of the place* from which the telegram was sent, that not being properly a part of the message, but rather a statement of fact peculiarly within the knowledge of the company.²

§ 241. **Considerations Showing that the Condition as to Repeating is a Mere Sham.**—No great mental exertion will be expended on this subject by any one who has had much practical acquaintance with the business of telegraphing, to convince him that the conditions as to repeating in the message blanks of the Western Union Telegraph Company (the company which does nearly all the telegraph business within the United States), was never intended to enable the senders of messages to guard against errors and imperfections incident to the nature of the service, but was a mere sham, designed to enable the telegraph company to take the money of its customers on consideration of its agreement to perform for them a certain service, and then escape all liability for failing to perform it, or for performing it negligently or imperfectly. This conclusion is at once suggested by that part of the condition which exonerates the company from the consequences of non-delivery or delay in delivering, neither of which

¹ Western Union Tel. Co. v. Stevenson, 128 Pa. St. 442; s. c., 5 L. R. A. 515; 24 W. N. C. 497; 18 Atl. Rep. 441.

² Western Union Tel. Co. v. Simpson, 75 Tex. 422; s. c., 11 S. W. Rep. 385.

happenings the repeating of the message would have any tendency to prevent. This part of the stipulation is, on its face, dishonest, corrupt and oppressive. But another consideration will show that it was never intended, by the astute lawyer who no doubt framed this stipulation and the company which adopted it, that the customer should, in fact, cause the message to be repeated. The object of resorting to the telegraph instead of to the mail, is to secure expedition in making communications. Common experience shows that such is the shameful manner in which this service is done by the one company which practically has a monopoly of the business, that a message sent by mail will often be delivered sooner than one sent by telegraph. If a message were repeated for the sake of greater accuracy, the time required for its delivery at the end of its transit (already shamefully long under the best conditions), would be greatly increased. This fact would defeat the very object of resorting to the telegraph, and will operate in most cases to deter a man in haste to have a message delivered, from ordering it to be repeated, especially in view of the further fact that the repeating of it incurs an additional expense. The condition was, therefore, never imposed upon the public from honest or sincere motives, but is a mere sham—a cunningly devised trap, and it is speaking within carefully chosen bounds to say that most of the judicial courts, in upholding the stipulation as reasonable, fell into the trap with shameful alacrity.¹

¹ Point is given to this statement by a case where a dispatch directed a sale at the board of brokers, and by reason of an error in transmitting

it, it had to be repeated, in consequence of which it was received too late to be fulfilled at the board, and the stock was purchased on the street at a loss. Here it was held, that the defendants, having placed it beyond the power of the plaintiff's brokers to make the purchase in the particular manner indicated, they could not avail themselves of the fact that the purchase was made in that mode. *Rittenhouse v. Independent Line of Telegraph*, 1 Daly (N. Y.), 474.

**ARTICLE IV.—STIPULATIONS AND LIMITATIONS AS TO
TIME AND MANNER OF PRESENTING CLAIMS
FOR DAMAGES.**

SECTION.

- 245. Such Stipulations, when Deemed Reasonable.
- 246. Reason of the Rule.
- 247. Limitation of Sixty Days not Unreasonable.
- 248. Validity of Limitation of Less than Sixty Days.
- 249. Circumstances under which Such Limitation too Short.
- 250. Thirty Days' Limitation with Knowledge of Loss Sufficient.
- 251. Whether Applicable to Actions for Statutory Penalties.
- 252. Applies only in Cases where Message is Sent.
- 253. What not a Waiver of Written Notice.
- 254. Notice must be Delivered to an Authorized Agent.
- 255. When Such a Limitation Begins to Run.
- 256. Commencement of Suit Equivalent to Notice in Writing.

§ 245. **Such Stipulations, when Deemed Reasonable.**—It may be stated, as a general principle, that a stipulation in a telegraph message blank that the company will not be liable for damages unless the claim therefor is presented within a certain time after the delivery of the message to the company for transmission, is reasonable, provided the time limited is not too short to enable the sender, in the exercise of ordinary diligence, to ascertain the fact of the mistake, delay, non-delivery or other default, and the amount of damages thereby occasioned, and to present his claim therefor.¹

¹ See cases cited in the following sections.

§ 246. **Reason of the Rule.**—The reason of this rule will suggest itself to the ordinary mind, but it was thus forcibly stated in a Pennsylvania case by Mr. Justice AGNEW: "But, clearly, it is not unreasonable that a telegraph company should require notice of claims for its defaults within a reasonable time, before being held to answer for the alleged default. From the very nature of its business, this may be essential to its protection against unfounded claims. These companies have often to wrestle with the elements themselves, in the storms which prostrate their lines or prevent their working, and are not to be held to a harsher rule than common carriers, who are excused by the act of God. Within sixty days the cause preventing the transmission of a message on a particular day might be easily ascertained and shown, which, after the lapse of several years, could not be discovered or proved. It is urged that the employer might not discover the failure to send his message forward within this time. How far this fact would displace the condition it is not proper now to say; but the reason is inapplicable to this case, where, from the nature of the message, its failure to reach its destination must be known, and was known, immediately by the employer. Another reason justifying the reasonableness of the provision for notice of the claim is found in the multitude of messages transmitted requiring a speedy knowledge of claims to enable the company to keep an account of its transactions, before, by reason of their great number, they cease to be within their recollection and control."¹

¹ *Wolf v. Western Union Tel. Co.*, 62 Pa. St. 83; s. c., 1 Am. Rep. 387, 389. A corresponding limitation in the contracts of *common carriers*

§ 247. **Limitation of Sixty Days not Unreasonable.**—Applying this principle, it has often been held that a stipulation, endorsed on a telegraph message blank, that the company would not be liable for damages in any case where the claim was not presented in writing within *sixty days* after sending the message, is reasonable, and consistent with public policy.¹

with their shippers is upheld on similar grounds. The question was elaborately discussed in *Southern Express Co. v. Caldwell*, 21 Wall. (U. S.) 264, and the right to impose such limitations upon shippers was upheld, the court saying: "Our conclusion, then, founded upon the analogous decisions of courts, as well as upon sound reason, is that the express agreement between the parties averred in the plea was a reasonable one, and hence that it was not against the policy of the law. It purported to relieve the defendants from no part of the obligations of a common carrier. They were bound to the same diligence, fidelity and care as they would have been required to exercise if no such agreement had been made. All that the stipulation required was that the shipper, in case the package was lost or damaged, should assert his claim in season to enable the defendants to ascertain the facts; in other words, that he should assert it within ninety days." (p. 272).

¹ *Young v. Western Union Tel. Co.*, 38 N. Y. Super. 390; s. c., 65 N. Y. 163; *Wolf v. Western Union Tel. Co.*, 62 Pa. St. 83; s. c., 1 Am. Rep. 387; *Western Union Tel. Co. v. Meredith*, 95 Ind. 93; *Western Union Tel. Co. v. Jones*, 95 Ind. 228; s. c., 48 Am. Rep. 713; *Western Union Tel. Co. v. Rains*, 63 Tex. 27; *Hill v. Western Union Tel. Co. (Ga.)*, 11 S. E. Rep. 874. Compare *Lewis v. Great Western R. Co.*, 5 Hurl. & N. 867; *Ripley v. Aetna Ins. Co.*, 30 N. Y. 136, 163; *Roach v. New York, etc. Ins. Co.*, 30 N. Y. 546; *Southern Express Co. v. Caldwell*, 21 Wall. (U. S.) 264; *Hart v. Pennsylvania R. Co.*, 112 U. S. 338. Similar provisions in policies of insurance in regard to proofs of loss have frequently been held good. *Land Ins. Co. v. Stauffer*, 33 Pa. St. 397; *Trask v. Insurance Co.*, 29 Pa. St. 198. In *Western Union Tel. Co. v. Longwill* the Supreme Court of New Mexico (21 Pac. Rep. 339) expressly held that the sixty day limit was against public policy and void. The judge, however, relied for his authority upon the case of *Johnston v. Western Union Tel. Co. (U. S. C. C., S. D. Ga.)*, 33 Fed. Rep. 362, and upon the cases of *Western Union Tel. Co. v. Cobbs*, 47 Ark. 344, and *Western Union Tel. Co. v. McKibben*, 114 Ind. 511; s. c., 14 N. E. Rep. 894. Neither of these cases is in point. In each the suit was for a *statutory penalty*, and the action was maintained upon the ground that that character of action did not come within the terms of the stipulation. *Post*, § 251.

§ 248. **Validity of Limitations of Less than Sixty Days.**—Some courts have upheld such limitations where the period was thirty days;¹ others, where the period of limitation was but *twenty days*;² and the leading English case upholds such a limitation where the period was but *seven days*.³ On the other hand, one American court holds, and seemingly with better reason, that a stipulation fixing the period of limitation at thirty days from the date of the receipt of the message by the transmitting company, is unreasonable and *void, as tending to fraud*.⁴

§ 249. **Circumstances Under Which Such Limitations too Short.**—It can readily be understood that circumstances might exist under which such a limitation would be unreasonably short.⁵ Such was the opinion of Mr. District Judge SPEER in a very well reasoned judgment. After reviewing the applicatory decisions he said: ‘Now, it is held that regulations which contravene the constitutional law or public policy of the place where they are set up are unreasonable. Is a stipulation which has the effect to preclude from his right of action the person to whom a prepaid telegram is directed, and to whom it has never been delivered, no matter how gross

¹ *Cole v. Western Union Tel. Co.*, 33 Minn. 227; *Beasley v. Western Union Tel. Co.*, 39 Fed. Rep. 181; *Western Union Tel. Co. v. Dunfield*, 11 Colo. 335; s. c., 18 Pac. Rep. 34; *Am. & Eng. Corp. Cas.* 111.

² *Aiken v. Telegraph Co.*, 5 S. C. 358; *Helman v. Western Union Tel. Co.*, 57 Wis. 562.

³ *Lewis v. Great Western R. Co.*, 5 Hurl. & N. 867.

⁴ *Southern Express Co. v. Caperton*, 44 Ala. 101.

⁵ For instance in the case of a common carrier, where a package was shipped, during the late civil war, when transportation was much impeded, from Clayton, Indiana, to Savannah, Georgia, it was held that such a limitation extending only thirty days from the date of the shipment was unreasonable and void. *Adams Express Co. v. Regan*, 29 Ind. 21.

the negligence of the telegraph company may be, a reasonable regulation? In the opinion of this court it is clearly unreasonable, and, besides, contrary to general public policy. He must present his claim in writing, in thirty days from the time the telegram is sent; but the failure of the company to deliver it deprives him, perhaps, of all notice that a telegram has been sent to him. How, then, can he be expected to make a claim for damages when he may be unconscious of the injury done him? If the stipulation is valid, the telegraph company can very readily defeat all redress by holding the telegram for thirty days after it is sent. Take this case: The plaintiff, assuming, *ex gratia exempli*, his statements to be true, is a farmer who lives six miles in the country; he has business negotiations important to him, but unimportant to his correspondent in Omaha; he leaves his address at the telegraph office; he calls repeatedly for his telegram; he is informed there is nothing for him; the telegraph company wires the Omaha firm that there is no such man as the plaintiff; they drop the matter; not receiving his telegram he drops it; after the expiration of thirty days he discovers the injury done him. Would any court of justice hold that it would be reasonable, under such circumstances to deny his right of action? And yet if the thirty days' stipulation is valid at all it would be valid in that case. Such a stipulation would be especially unreasonable when the company, because of its monopoly, has the power to deprive the citizen of the means of telegraphic communication, unless he will subscribe to its regulations, however unreasonable. I cannot recognize the doctrine as insisted by defendant's

counsel.”” This reasoning seems to be unanswerable, especially in its application to such a case as is understood to have been before the court, a case where the message was not delivered until the period of limitation had expired.

§ 250. **Thirty Days' Limitation with Knowledge of Loss Sufficient.**—On the other hand, it was said by LEWIS, P. J., in giving the opinion of the St. Louis Court of Appeals upholding a period of limitation of thirty days: “An agreement between parties to a contract, limiting a reasonable time within which a claim of damages may be preferred, is now universally held to be binding, on the strength of the maxim, *conventio vincit legem*. When a definite term is fixed, the question of its reasonableness is to be determined by the court. Where the only limitation is that a thing shall be done within a reasonable time, it is proper for the jury to say what is a reasonable time, in the circumstances of the case. No precedent has denied that thirty days constitute a reasonable time, in cases similar to the present. So far from it, twenty days have been authoritatively held sufficient.” But the plaintiffs insist that the question of reasonable time must be determined in each case by its particular circumstances. This is true only with certain qualifications. There have been cases in which the party claiming damages could not possibly have been made aware of his loss until after it was too late to claim within the limited time. No case can be found, however, in which, where there was sufficient time left, after the discovery of the loss, for the claim to be presented

¹ Johnston v. Western Union Tel. Co., (U. S. C. C., S. D. Ga.), 33 Fed. Rep. 362, 365.

² Citing Helman v. Telegraph Co., 57 Wis. 562.

within the limited period, the plaintiff was absolved from the effect of the limitation by the lateness of his discovery.¹

§ 251. **Whether Applicable to Actions for Statutory Penalties.**—Even where it is held that a telegraph company cannot by contract evade the penalty prescribed by statute for a breach of its duty in sending messages, the courts recognize the reasonableness of this rule, by holding that such a company may lawfully contract that any claim for the statutory penalty must be made within sixty days.² Such a stipulation, however, *does not bind the person addressed* where he proceeds under another section of the same statute.³ Other courts hold that such a clause in a message blank does not apply in an action to recover a penalty under a statute for neglect to transmit a message,⁴ or for negligent *delay* in delivering it.⁵

§ 252. **Applies only in Cases Where Message is Sent.**—A stipulation limiting the time “after the sending of the message” within which an action for a breach of contract to transmit and deliver a telegram must be brought, has no application until *some effort* has been made by the company to perform, or attempt to perform the contract.⁶ It applies only to cases *where the message is sent*: if there is a

¹ Massengale v. Western Union Tel. Co., 17 Mo. App. 257, 260.

² Western Union Tel. Co. v. Jones, 95 Ind. 228; s. c., 48 Am. Rep. 713.

³ Western Union Tel. Co. v. McKibben, 114 Ind. 511 (decided under Sec. 4177 Rev. Stat. Ind., and distinguishing cases decided under Sec. 4176 of the same statute).

⁴ Western Union Tel. Co. v. Cooledge (Ga.), 12 S. E. Rep. 264.

⁵ Western Union Tel. Co. v. Cobbs, 47 Ark. 344; s. c., 1 S. W. Rep. 558.

⁶ Western Union Tel. Co. v. Way, 83 Ala. 542; s. c., 4 South. Rep. 844.

total failure to transmit, no written notice or demand is required to fix liability.¹

§ 253. **What not a Waiver of Written Notice.**—The *promise* of an *agent*, when the complaint is made *orally*, to look into the matter, has been held, on questionable grounds, not a *waiver* of the right to demand a written notice of the claim.² But it has been held that a *refusal* of the agent or manager on duty at the station from which a message was sent, to *pay* a claim for damages for negligence in transmitting or delivering the message, upon the sole ground that the company was not to blame, constitutes a waiver of a condition requiring written notice of the claim within a time limited.³

§ 254. **Notice must be Delivered to Authorized Agent.**—The notice must be delivered to some agent of the company authorized to receive it. A mere *operator* has not, in the absence of a showing to the contrary, any such authority, any more than an artisan employed by a manufacturing corporation would have authority to receive such a notice for the corporation. Accordingly, where an imperfect statement of a claim for damages was presented, by an agent of the person claiming damages, to an operator or receiving clerk of the company, who, after examining it, handed it back to the person presenting it, stating that he had nothing to do with it, and referring him at the same time to the officers of the company, and he thereupon went to

¹ *Western Union Tel. Co. v. Yopst*, 118 Ind. 248; s. c., 21 Am. and Eng. Corp. Cas. 88; 25 *Id.* 514; 3 L. R. A. 224; 20 N. E. Rep. 222. See also *Western Union Tel. Co. v. Dunfield*, 11 Colo. 335; *Bennett v. Western Union Tel. Co.*, 18 N. Y. State Rep. 777; 2 N. Y. Supp. 365.

² *Massengale v. Western Union Tel. Co.*, 17 Mo. App. 257.

³ *Hill v. Western Union Tel. Co. (Ga.)*, 11 S. E. Rep. 874.

their rooms and found them absent, and no other claim was presented until after the expiration of sixty days, it was held that the company was not liable.¹ But where the plaintiff informed the operator of a mistake in transmitting a message, and was by him referred to the principal office, where a *clerk* told him that the manager was busy, and took down his complaint in writing, and handed it to a person in another room, whom he introduced as *attorney* of the company, which attorney promised to investigate the matter, and afterwards, in reply to the plaintiff's inquiry, wrote a letter rejecting the claim, using paper and an envelope with printed headings representing him to be the attorney of the company—it was held that it sufficiently appeared that complaint was made to the proper authorities.² On the other hand, it has been held that the *agent or manager* of a telegraph company *on duty at the station* from which a message was sent, is a proper person upon whom to make demand for damages claimed for negligence in transmitting or delivering the message, and is competent to recognize an act upon an oral demand, and thus waive any condition requiring notice to be in writing.³

§ 255. **When the Limitation Begins to Run.**—Without impugning the foregoing reasoning that the period of limitation begins to run from the date of the delivery of the message to the transmitting company, and that “a delay in receiving the message, though occasioned by the mistake of the company, would not modify the condition or extend the

¹ *Young v. Western Union Tel. Co.*, 65 N. Y. 163.

² *Bennett v. Western Union Tel. Co.*, 18 N. Y. St. Rep. 777; s. c., 2 N. Y. Supp. 365.

³ *Hill v. Western Union Tel. Co. (Ga.)*, 11 S. E. Rep. 874.

time, *if a reasonable time was left, after knowledge of the mistake, to present the claim.*''¹ No well considered case can be found, however, in which, when there was sufficient time left, after discovery of the loss, for the claim to be presented within the limited period, the plaintiff was absolved from the effect of the limitation by the lateness of his discovery.²

§ 256. **Commencement of Suit Equivalent to Notice in Writing.**—The general rule, subject to exceptions, is that the commencement of an action is equivalent to a *demand*; and, by analogy to this, it has been held that in case of a claim for damages against a telegraph company for failure to deliver a message, which is required to be presented in writing within sixty days, the bringing of suit therefor, and *service of process within the time*, is equivalent to such presentation.³

¹ Helman v. Western Union Tel. Co., 57 Wis. 562.

² Massengale v. Western Union Tel. Co., 17 Mo. App. 257.

³ Western Union Tel. Co. v. Henderson, 89 Ala. 510; s. c., 7 South. Rep. 419; 30 Am. & Eng. Corp. Cas. 615.

CHAPTER IX.

CONNECTING LINES.

SECTION.

- 261. Statutory Obligation to Forward Dispatches Delivered by Connecting Lines.
- 262. Not Liable for Defaults of Connecting Lines.
- 263. May Stipulate against Liability for Defaults of Connecting Lines.
- 264. May Become so Liable by Contract.
- 265. Reasonableness of Particular Regulations as to Connecting Lines.
- 266. Evidence of Negligence where Dispatch Received from Connecting Line.
- 267. Illustration: Negligence of Connecting Line—Change of Address.
- 268. Company Receiving Message from Connecting Line cannot Avail Itself of Conditions in Message Blank.

§ 261. **Statutory Obligation to Forward Dispatches Delivered by Connecting Lines.**—By statutes previously referred to,¹ it is generally incumbent upon telegraph companies to receive and transmit the dispatches offered by other companies, as well as those offered by the public generally. In case of a refusal by one line to forward the messages of another company, an action may be maintained by the company for the *statutory penalty*, although it was expressly constituted the agent of the sender

¹ *Ante*, § 157.

for the transmission of the message.¹ This conclusion becomes more clear, when it is considered that the forwarding of messages by connecting lines is not always a *voluntary* undertaking on the part of the receiving company; though in most cases the interest of such companies would lead them to make arrangements of this kind, just as connecting lines of carriers do. But, as telegraph companies are generally under an obligation *by statute*² to forward the dispatches of other companies, the reasonable conclusion would be that such a company is not responsible for the manner in which the connecting company performs the service; for it would be a hard law that would force two such undertakers in business relations, and at the same time make them liable for each other's defaults.³

§ 262. **Not Liable for Defaults of Connecting Lines.**

—Where the dispatch must be sent over a connecting line operated by another company in order to reach its destination, there is no implication of law that the company receiving the message contracts for the entire transit. In the absence of an express undertaking, it undertakes for care and attention in transmitting it over its own line, and for

¹ *United States Tel. Co. v. Western Union Tel. Co.*, 56 Barb. (N. Y.) 46. But it would seem that the sender might sustain this action in such a case. *Thurn v. Alta California Tel. Co.*, 15 Cal. 472; *Baldwin v. United States Tel. Co.*, 54 Barb. (N. Y.) 505; *Leonard v. New York, etc. Tel. Co.*, 41 N. Y. 544; *Squire v. Western Union Tel. Co.*, 98 Mass. 232.

² *Ante*, § 158.

³ In Alabama it is said that a telegraph company is not compelled by any public duty to receive messages for transmission beyond its own lines, or to secure such transmission; and if such service be undertaken, it may fix terms, conditions and regulations, not contrary to law or public policy, upon which it will receive and undertake to secure the transmission of cablegrams to points of destination in foreign countries. *Western Union Tel. Co. v. Way*, 83 Ala. 542; s. c., 4 South. Rep. 844.

its prompt delivery to a competent connecting company for further transmission. When it is so delivered, its liability terminates, and that of the connecting company begins.¹ In other words, no *partnership* or *mutual agency* can be inferred to exist between coterminous lines of telegraph, from the fact that each receives messages from the other for transmission over its own lines, as required by law. In the absence of any special agreement or arrangement, either with the sender of the message or with each other, each company is liable only for its own defaults.²

§ 263. **May Stipulate against Liability for Defaults of Connecting Lines.**—"This being the legal status of the company," says Mr. Freeman, "it seems clear that it may stipulate with the sender of a message that the company shall be 'hereby made the agent of the sender, without liability, to forward any message over the lines of any other company when necessary to reach its destination.' It is a matter upon which the company is competent to contract specially, and the stipulation is reasonable in its terms."³ That such a company may stipulate with the sender of messages against the errors, negligences, or other defaults of connecting lines, is the undoubted law.⁴

¹ *Leonard v. New York, etc. Tel. Co.*, 41 N. Y. 544; s. c., 1 Am. Rep. 446; *Baldwin v. United States Tel. Co.*, 45 N. Y. 744 (reversing s. c., 34 Barb. (N. Y.) 505; 1 Lans. (N. Y.) 125; 6 Abb. Pr. (N. S. (N. Y.) 405).

² *Baldwin v. United States Tel. Co.*, 45 N. Y. 744; s. c., 6 Am. Rep. 165; *Squire v. Western Union Tel. Co.*, 98 Mass. 232; *Leonard v. New York, etc. Tel. Co.*, 41 N. Y. 544, 570; *Stevenson v. Montreal Tel. Co.*, 16 Upper Canada Q. B. 539. *Contra*: *De Rutte v. New York, etc. Tel. Co.*, 1 Daly (N. Y.), 547; s. c., 30 How. Pr. (N. Y.), 403.

³ Note to *Camp v. Western Union Tel. Co.*, 71 Am. Dec. 471.

⁴ *Western Union Tel. Co. v. Carew*, 15 Mich. 525; s. c., 2 Thomp. Neg. 829; *Western Union Tel. Co. v. Munford*, 87 Tenn. 190.

§ 264. **May Become so Liable by Contract.**—On the other hand, there is no rule of law or principle of public policy which prevents a telegraph company from making itself liable by contract for the negligence or defaults of connecting lines. Accordingly, it has been held that, where a telegraph company agrees with a customer to furnish him with daily reports of the grain market in a distant city, and these reports, as furnished by the company to the customer, are incorrect, the company is liable for the damages, although it has received the reports over a connecting line, and although the mistake may have been due to the negligence of the servants of the connecting line. "In undertaking to furnish reports of the markets, they bound themselves to furnish *true* reports, and they would be liable for sending those which would tend to deceive plaintiff, and thus subject him to loss."¹

§ 265. **Reasonableness of Particular Regulations as to Connecting Lines.**—A regulation which requires the name of the company from which the message is received, and the date of the receipt, to be added to every message which it accepts from other companies for *transmission to Europe*, and which demands an additional sum for the transmission of this addition, has been held reasonable and valid.² But a regulation which required that, when a message is received from another company at New York for transmission to Europe, a *power of attorney* from the sender of the message must be produced, author-

¹ *Turner v. Hawkeye Tel. Co.*, 41 Iowa, 458; s. c., 20 Am. Rep. 605, 608; *Bank of New Orleans v. Western Union Tel. Co.*, 27 La. An. 49.

² *Atlantic, etc. Tel. Co. v. Western Union Tel. Co.*, 4 Daly (N. Y.), 527.

izing it to forward the message, has been held unreasonable and void.¹

§ 266. **Evidence of Negligence where Dispatch Received from Connecting Line.**—Where the dispatch received from a connecting line is erroneously delivered, it is presumed, in the absence of evidence to the contrary, that it was correctly delivered to the defendant by the connecting line, and that the error happened through the negligence of the defendant.² The reason is that, if the defendant is innocent of committing the error, it has within its power the means of showing that it transmits the dispatch as it was delivered to it by the connecting line, and the plaintiff has not the means of showing what the real fact was.³ This is in accordance with what has been held concerning the liability of a *common carrier*, where there has been a through contract of shipment over several connecting lines. Here, if the last carrier makes only a partial delivery of the goods, he must account for the loss or pay damages.⁴

§ 267. **Illustration: Negligence of Connecting Line—Change of Address.**—Although the address of a telegraphic message is negligently changed in transmitting it to the connecting line,⁵ yet if it appears that the loss for which the action is brought was occasioned by a *delay* in the delivery of the message, which did not proceed from such error,

¹ Atlantic, etc. Tel. Co. v. Western Union Tel. Co., 4 Daly (N. Y.), 527.

² Turner v. Hawkeye Tel. Co., 41 Iowa, 458; s. c., 20 Am. Rep. 605; Lagrange v. Southwestern Tel. Co., 25 La. An. 383.

³ Lagrange v. Southwestern Tel. Co., *supra*.

⁴ Southern Exp. Co. v. Hess, 53 Ala. 19, 24; Laughlin v. Railroad Co., 43 Barb. (N. Y.) 225; s. c., affirmed, see index 41 N. Y. 620; Lin v. Terre Haute, etc. R. Co., 10 Mo. App. 125.

⁵ In this case, from "Col. Sam. Tate" to "Col. William Tate."

but was the sole result of the subsequent and independent negligence of the connecting company, the receiving company is not liable for the damages sustained, under a contract with the sender exonerating itself from liability for the defaults of connecting lines. The reason is that the change of address is not the *proximate cause* of the loss.¹

§ 268. **Company Receiving Message from Connecting Line Cannot Avail Itself of Conditions in Message Blank.**—Where a telegraph company receives a message for transmission to a distant point over its own line, and thereafter over a connecting line, upon its message blank, in which the receiving company assumes “no liability for any error or neglect by any other company over whose lines this message may be sent to reach its destination,” and the message is not delivered within a reasonable time, in consequence of the negligence of the agents of the connecting line, and the sender of the dispatch brings an action against such connecting company for damages, the defendant cannot avail itself of another condition in the blank of the original company receiving the message, limiting the liability of *that company* in case of the message not being repeated. In so holding, the court, speaking through BIGELOW, C. J., said: “The terms and conditions on which the message was received and transmitted by the company at Boston to the defendants at Albany [the receiving company], do not purport on their face to be intended to apply to the service which might be performed by any other company in the transmission of the message beyond the terminus of the line of the company to which it was first deliv-

¹ *Western Union Tel. Co. v. Munford*, 87 Tenn. 190; s. c., 10 Am. St. Rep. 630; 10 S. W. Rep. 313.

ered. Not only are these terms and conditions expressly limited to the company first receiving the message, but it is also distinctly stipulated that no liability is assumed for any error or neglect by any other company by which the message may be sent in order to reach its destination, clearly indicating an intent to apply the special terms and conditions to their own contract only, and to the service which they undertook to perform, and not to extend them beyond their own line, so as to qualify or control the liability which other companies might assume in the transmission of the message. No evidence was offered at the trial to show that the defendants [the connecting line] had in any way restricted their general liability for the service which they undertook to render, or that they had ever authorized the company in Boston to enter into special stipulations in their behalf, or that the plaintiff had any notice of their usages or mode of doing business, or that they did not intend to assume the liability which the law affixed to the employment which they held themselves out to the public as ready to carry on. The case, therefore, stands as an action for damages for breach of a contract entered into by the defendants through their authorized agent, to which no special stipulations or restrictions on their liability were attached, and on which they are to be held responsible according to the general rules of law.”¹

¹ Squire v. Western Union Tel. Co., 98 Mass. 232; s. c., 93 Am. Dec. 157. Compare Baldwin v. United States Tel. Co., 45 N. Y. 744, s. c., 6 Am. Rep. 165, where this case is cited to the point that each of two connecting telegraph lines must answer for its own defaults only.

CHAPTER X.

NEGLIGENCE BY TELEGRAPH COMPANIES.

- Article I. EVIDENCE OF NEGLIGENCE GENERALLY.
Article II. IN CASES OF NON-DELIVERY.
Article III. IN CASES OF DELAY.
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ARTICLE I.—EVIDENCE OF NEGLIGENCE.

SECTION.

273. When the Happening of an Accident is Evidence of Negligence: *Res Ipsa Loquitur*.
274. The Undertaking and Failure Constitute *Prima Facie* Evidence of Negligence.
275. Failure to Transmit.
276. Error in Transmission.
277. How in Cases where there is a Stipulation against Liability unless the Message is Repeated.
278. Incongruity of these Holdings Pointed out.
279. A Corresponding Divergence of Opinion in the Case of Common Carriers.
280. What Circumstances Afford Evidence of "Gross Negligence."
281. Evidentiary Circumstances Rebutting this *Prima Facie* Case.
282. Burden as to Free Delivery Limits.

§ 273. When the Happening of an Accident is Evidence of Negligence: *Res Ipsa Loquitur*.—It may be stated with confidence, as a general principle of law, that where an accident happens which, in the ordinary course of things, and according to

common experience, would not happen if reasonable or ordinary care were exercised to prevent it by the person whose duty it is to prevent it, the happening of the accident is of itself evidence of negligence sufficient, in an action for the resulting damages against the person guilty of the default, to warrant a jury in giving a verdict for the plaintiff.¹ This principle was thus formulated by Mr. Chief Justice ERLE in the following language: "Where the thing is shown to be under the management of the defendant or his servants, and the accident is such as, under an ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care." The principle is of special application in cases of bailment, and in other like cases, where a party undertakes, for a reward paid or to be paid to him by another, to do for that other a certain definite thing, and then for some undisclosed reason, fails to do it; in every such case, the assumption of the obligation and the failure to perform it constitutes evidence of negligence, and this being proved, the burden is cast upon him of excusing his default. For instance, a carrier undertakes, for a reward, to carry a person from one place to another. He is not, by the rules of the common law, an insurer, as is the carrier of goods, but he is under an obligation to use such skill and care as the important and serious nature of his undertaking demands. The passenger is

¹ See the observations of Lord Cockburn, in *Kearney v. Railroad Co.*, L. R. 5 Q. B. 411, and L. R. 4 Q. B. 759; s. c., 2 *Thomp. Neg.* 220.

² *Scott v. Dock Co.*, 11 Jur. (N. S.) 1108.

hurt in the transit, from some cause not manifestly beyond the control of the carrier. The law casts the burden upon him to show that 'the accident took place without his fault.' So, if a bailee receives goods to keep and fails to deliver them, this is *prima facie* evidence to charge him, and he must explain or pay damages.' So, in the case of a common carrier of goods, where there is a special contract releasing him from the onerous liability of the common law, if he fails to deliver the goods at the end of the transit, in accordance with the contract of affreightment, he must excuse himself or pay damages.' All these cases are cases for the application of the maxim *res ipsa loquitur*—*the thing itself speaks*. Beyond question, in the case where a company engaged in the transmission of written messages by telegraph, fails to deliver a message seasonably and correctly, in accordance with its undertaking, the two facts of the undertaking and the default make out a case of negligence sufficient to charge such company with the payment of damages, unless it produces an explanation sufficient in law, and proves it to the satisfaction of the jury.

§ 274. **The Undertaking and Failure Constitute Prima Facie Evidence of Negligence.**—Numerous cases uphold this principle in actions for damages against telegraph companies for failing to transmit and deliver messages with reasonable diligence and correctly, in accordance with their undertaking. Under this rule, a *prima facie* case is made by proving the delivery of the message to the telegraph

¹ See cases collected in *Dougherty v. Missouri Pac. R. Co.*, 9 Mo. App. 478.

² 2 Thomp. Tr. § 1832.

³ *Ibid.* §§ 1832, 1833.

company for transmission, with the payment or tender of the customary and usual charge, and of the non-delivery by the company of the message to the person addressed, and of the damages which have resulted to the plaintiff from such non-delivery. "It is not necessary that they show affirmatively that the failure to deliver happened through any omission of duty by the company or its officers, or from some defect in the instrumentalities employed by the company. The failure to deliver being shown, the legal presumption is that it was caused by some one or the other of these causes, or of all combined. It then becomes incumbent on the defendant, if it would relieve itself from the consequences of such presumption, to overcome that presumption by showing that in the attempted transmission and delivery of the message, it exercised all proper care and diligence commensurate with the undertaking, and that the failure is not attributable to any fault or negligence on its part, or that of any of its employees.'"

§ 275. **Failure to Transmit.**—Thus, where a telegraph company receives a message for transmission and sends it to an *intermediate point*, and does not send it further, and gives no reason for its failure,—this is evidence of *gross negligence* sufficient to charge it with the damages which the sender of the message

¹ *Fowler v. Western Union Tel. Co.*, 80 Me. 381; s. c., 6 Am. St. Rep. 211, 216; 15 Atl. Rep. 29; 38 Alb. L. J. 276; 16 Wash. L. Rep. 591; 4 Rail. & Corp. L. J. 346. Citing *Bartlett v. Western Union Tel. Co.*, 62 Me. 209, 221; s. c., 16 Am. Rep. 437; *Baldwin v. United States Tel. Co.*, 45 N. Y. 744; s. c. 6 Am. St. Rep. 165; *Western Union Tel. Co. v. Graham*, 1 Colo. 230; s. c., 9 Am. Rep. 136; *United States Tel. Co. v. Wenger*, 55 Pa. St. 262; s. c., 93 Am. Dec. 751.

has thereby sustained.¹ So, under a statute 'making it the duty of telegraph companies to transmit messages "with impartiality and good faith, under the penalty of \$100 for every neglect or refusal so to do," on proof that the company's agent received the message but did not deliver it, negligence will be presumed, and the company must show a sufficient excuse or pay damages.'

§ 276. **Error in Transmission.**—A telegraph company is bound to transmit a message in the form and language in which it is written, and if it has committed an *error in transmitting* the message, the plaintiff, in the view of many courts, makes out a *prima facie* case by proving the fact of the error and the damages.⁴ For instance, the *omission of a material word* in the transmission of a telegraphic message raises a *prima facie* presumption that the mistake resulted from the fault of the company, and the court will not consider the possibility, in the absence of evidence on the point, that it may have

¹ United States Tel. Co. v. Wenger, 55 Pa. St. 262; s. c., 93 Am. Dec. 751.

² Gantt, Ark. Dig. § 5721.

³ Little Rock, etc. Tel. Co. v. Davis, 41 Ark. 79.

⁴ Bartlett v. Western Union Tel. Co., 62 Me. 209; s. c., 16 Am. Rep. 437; Turner v. Hawkeye Tel. Co., 41 Iowa, 458; s. c., 20 Am. Rep. 605; Rittenhouse v. Independent Line of Telegraphs, 1 Daly (N. Y.), 475; s. c., affirmed, 44 N. Y. 263; s. c., 4 Am. Rep. 673; Tyler v. Western Union Tel. Co., 60 Ill. 421; s. c., 14 Am. Rep. 38; Telegraph Co. v. Griswold, 37 Ohio St. 301; Pluckney v. Telegraph Co., 19 S. C., 71; Pope v. Western Union Tel. Co., 9 Bradw. (Ill.) 283. See also New York, etc. Tel. Co. v. Dryburg, 35 Pa. St. 298; Brown v. Lake Erie Tel. Co., 1 Am. Law Reg. 685; Stevenson v. Montreal Tel. Co., 16 Up. Canada Q. B. 530; De Rutte v. New York, etc. Tel. Co., 1 Daly (N. Y.), 547. Compare Washington, etc. Tel. Co. v. Hobson, 15 Gratt. (Va.) 122; Western Union Tel. Co. v. Short, 53 Ark. 434; s. c., 9 L. R. A. 744; 9 Rail. & Corp. L. J. 111; 14 S. W. Rep. 649; Western Union Tel. Co. v. Carew, 15 Mich. 525; s. c., 2 Thomp. Neg. 828.

resulted from causes beyond the control of the company.¹

§ 277. **How in Cases where there is a Stipulation against Liability unless the Message is Repeated.**—There is no difficulty at all with this question until we reach a class of cases already considered, where there is, in the message blank, a stipulation against liability on the part of the company, unless the message is repeated at extra expense to the sender. Here, as already seen,² some of the courts take the distinction that, in such cases, the stipulation operates to shift the burden of proof, and to cast upon the plaintiff the *onus* of showing negligence by other evidence of negligence or want of good faith than that of the undertaking and the default in its performance.³

§ 278. **Incongruity of these Holdings Pointed Out.**—These decisions involve the solecism that, while they admit that the company cannot by contract exonerate itself from liability for negligence, yet it can contract with the sender of the message, that he shall not be allowed to prove such negligence by the legal evidence which is alone available in most cases of this kind; it cannot buy an exemption from the consequences of its negligence, but it can buy the plaintiff's right to prove the negligence.⁴

¹ *Ayer v. Western Union Tel. Co.*, 79 Me. 493; s. c., 1 Am. St. Rep. 353.

² *Ante*, § 221.

³ *Sweetland v. Illinois, etc. Tel. Co.*, 27 Iowa, 433; s. c., 1 Am. Rep. 285; *United States Tel. Co. v. Gildersleve*, 29 Md. 232; s. c., 96 Am. Dec. 519; *Becker v. Western Union Tel. Co.* 11 Neb. 87; s. c., 38 Am. Rep. 356; *White v. Western Union Tel. Co.*, 14 Fed. Rep. 710; *Aiken v. Western Union Tel. Co.*, 69 Iowa, 31.

⁴ Thus, according to the doctrine of the leading case of *Sweetland v. Illinois, etc. Tel. Co.*, 27 Iowa, 433; s. c., 1 Am. Rep. 285, the telegraph company cannot contract away its obligation to use ordinary care, but

It is creditable to American jurisprudence, that a doctrine at once so absurd and unjust has not met with universal acceptance. It has been distinctly repudiated by the Supreme Court of Ohio, in the following language, applicable to cases where there was a stipulation against liability, unless the message should be repeated: "The failure of the telegraph company to transmit and deliver the message in the form or language in which it is received, is *prima facie negligence* for which the company is liable; to exonerate itself from the liability thus presumptively arising, it must show that the mistake was not attributable to its fault or negligence. This rule is not only sustained upon sound reason, but is well sustained by well considered cases."¹

§ 279. **A Corresponding Divergence of Opinion in the Case of Common Carriers.**—There is a corresponding divergence of judicial opinion in respect of the burden of proof in an action against a *common carrier* where there is a stipulation in the contract of carriage against liability, or against liability beyond a certain sum, in the case of loss or damage happening through a named peril. Here, then, is a collection of cases holding that, while the initial burden of proof is sustained by evidence of delivery to the carrier and of non-delivery by him after the lapse of a reasonable time, or of delivery to him in good condition and of re-delivery by him in a damaged condition, so as to cast upon him the burden of explaining the non-delivery or the dam-

It can contract away from the plaintiff his right to prove the want of ordinary care by the customary evidence of the assumption of the undertaking and default in its performance.

¹ *Telegraph Co. v. Griswold*, 37 Ohio, St. 301, 313 per Boynton, C. J.; s. c., 41 Am. Rep. 500. So in Tennessee. *Marr v. Western Union Tel. Co.*, 85 Tenn. 529.

age, in a manner consistent with his innocence,¹ yet when the carrier assumes this burden, and presents evidence which, according to the usual formula of judicial deliverances, "brings the case within the excepted peril," that is, shows that the peril excepted by the contract was present and operating as an efficient cause of the loss or damage, the burden of proof then shifts upon the plaintiff to prove that, notwithstanding the presence of the excepted peril and its operation as an efficient cause in producing the loss or damage, the carrier was guilty of negligence or fault.² The other conception is that it is not enough for the carrier to show that, at the time of the happening of the loss or damage, the excepted peril was present and operating to produce it, but that he must *also* show that he and his servants *were not* guilty of negligence or fault in the premises—in other words, that the excepted peril was the sole cause of the damage.³

¹ 2 Thomp. Tr. § 1850, and cases collected on page 1345.

² Clark v. Barnwell, 12 How. (U. S.) 272; Spyer v. The Mary Belle Roberts, 2 Sawy. (U. S.) 1; Hunt v. The Cleveland, 6 McLean (U. S.), 76, 78; Wertheimer v. Pennsylvania R. Co., 17 Blatchf. (U. S.) 421; The Neptune, 6 Blatchf. (U. S.) 194; Kelham v. The Kensington, 24 La. An. 100; Kirk v. Folsom, 23 La. An. 584; Price v. Ship Uriel, 10 La. An. 413; Colton v. Cleveland, etc. R. Co., 67 Pa. St. 211; Patterson v. Clyde, 67 Pa. St. 500, 506; Little Rock, etc. R. Co. v. Corcoran, 40 Ark. 375; Little Rock, etc. R. Co. v. Talbot, 29 Ark. 523, 530; Little Rock, etc. R. Co. v. Harper, 44 Ark. 208; Mitchell v. United States Exp. Co., 46 Iowa. 214; Whitworth v. Erie R. Co., 87 N. Y. 413, 419; Lamb v. Camden, etc. R. Co., 46 N. Y. 271 (two of the five judges dissenting); Farnham v. Camden, etc. R. Co., 65 Pa. St. 53; Read v. St. Louis, etc. R. Co., 60 Mo. 199; Davis v. Wabash, etc. R. Co., 89 Mo., 340, 352 (reversing s. c., 13 Mo. App. 449).

³ Swindler v. Hilliard, 2 Rich. L. (S. C.) 286; Baker v. Brinson, 9 Rich. L. (S. C.) 201; Singleton v. Hilliard, 1 Strobb. L. (S. C.) 203; United States Exp. Co. v. Backmann, 28 Ohio St. 144; Union Exp. Co. v. Graham, 26 Ohio St. 595; Berry v. Cooper, 28 Ga. 543; Davidson v. Graham, 2 Ohio St. 131, 141; Graham v. Davis, 4 Ohio St. 362; Whitesides v. Russell, 8 Watts & S. (Pa.) 44; Levering v. Union Transp. Co., 42 Mo. 88,

§ 280. **What Circumstances Afford Evidence of "Gross Negligence."**—Where the conceptions first alluded to prevail,¹ it is well concluded that the failure of a telegraph company to employ *careful* and *skillful operators* is *gross negligence*.² In another case it was said, where the message as delivered to the person addressed contained three substantial deviations from the message as delivered to the company for transmission, that the mere production of such a "*mutilated message*" would be sufficient to establish the *gross carelessness* of the defendant, and would cast the burden of proof upon the defendant to excuse or explain the mistakes.³ In another case, a message was received by a telegraph company to be sent to plaintiff's attorney at N., and the agent at the transmitting office informed the agent at N. of the number of words contained in the message, and, having sent the message, received from the agent at N. the signal indicating that it had been properly received, and that it contained the number of words indicated. In an action for negligent delivery, the agent at N. admitted that the word "six"

95, 96 (overruled, it seems, by *Read v. St. Louis, etc. R. Co.*, 60 Mo. 199); *Chicago, etc. R. Co. v. Moss*, 60 Miss. 1003; s. c., 45 Am. Rep. 428; *Chicago, etc. R. Co. v. Abels*, 60 Miss. 1017; *Brown v. Adams Exp. Co.*, 15 W. Va. 812, 818; *Hays v. Kennedy*, 41 Pa. St. 378, 384; *Humphreys v. Reed*, 6 Whart. (Pa.) 435, 444 (overruled, it seems, by *Patterson v. Clyde*, 67 Pa. St. 500, 506, and *Farnham v. Camden, etc. R. Co.*, 55 Pa. St. 53); *South, etc. R. Co. v. Henlein*, 52 Ala. 606, 612; *Read v. Spaulding*, 30 N. Y. 630, 645; *Michaels v. New York, etc. R. Co.*, 30 N. Y. 564, 578 (overruled by *Whitworth v. Erie R. Co.*, 87 N. Y. 413, 419, and *Lamb v. Camden, etc. R. Co.*, 46 N. Y. 271). The sources of this divergence of opinion and the inconsistency of the courts in respect of it are treated in 2 Thomp. Tr. Sec. 1851, *et seq.*

¹ *Ante*, § 279.

² *Pegram v. Western Union Tel. Co.*, 97 N. C. 57; s. c., 2 S. E. Rep. 256.

³ *Western Union Tel. Co. v. Crall*, 38 Kan. 679; s. c., 5 Am. St. Rep. 795.

had been omitted before the words "hundred and sixty-three" and that the word "answer" was dropped, but testified that the atmospheric conditions at N. were not favorable when the message was received. It was held, that this evidence showed *gross negligence* on the part of the company.¹

§ 281. **Evidentiary Circumstances Rebutting this Prima Facie Case.**—Where a night dispatch was in the course of transmission, and had been received by a repeating office, and hung upon the proper hook to be forwarded to the office by which it was to be delivered in the morning, and it appeared that it could not be sooner forwarded by reason of there being no operator at that office to receive it until morning, and the contract on the night message blank provided that the company should not be obliged to deliver it earlier than the morning of the next ensuing business day, and a fire broke out in the operating room where the message was hung, and before it could be rescued the message was destroyed, which fire, as the evidence showed, was due to atmospheric conditions and influences over which the telegraph company had no control, and not to any fault or negligence of the company or its employees, nor to any imperfection in the chemicals, metals or machinery used by it, it was held that the *prima facie* case of negligence, which was raised by the proof of delivery of the message to the defendant and its non-delivery of the same to the person addressed, was rebutted;² that is, that this col-

¹ Western Union Tel. Co. v. Goodbar (Miss.), 7 South. Rep. 214.

² Fowler v. Western Union Tel. Co., 80 Me. 381; s. c., 6 Am. St. Rep. 211, 217; 15 Atl. Rep. 29; 38 Alb. L. J. 276; 16 Wash. L. Rep. 591; 4 Rall. & Corp. L. J. 346.

lection of facts, if admitted or established, exonerated the telegraph company as matter of law.

§ 282. **Burden as to Free Delivery Limits.**—In an action for failure to deliver a message within a reasonable time, where the defense is that the person to whom it was addressed lived outside of the free delivery limits, and that the plaintiff (the sender) failed to comply with the regulation of the company requiring a deposit to pay for delivery in such case, the burden is on the plaintiff to prove that such person lived within the limits.¹

¹ *Western Union Tel. Co. v. Henderson*, 89 Ala. 510; s. c., 30 Am. & Eng. Corp. Cas. 615; 7 South. Rep. 419.

ARTICLE II.—IN CASES OF NON-DELIVERY.

SECTION.

- 286. Must Make what Efforts to Deliver Message.
- 287. Diligence in Delivering whether a Question of Law or of Fact.
- 288. Cases where Ruled as a Question of Law.
- 289. Delivery to Other Person than the Addressee.
- 290. Where the Message is Addressed to One Person in the Care of Another.
- 291. Plaintiff not Bound to Show that the Addressee was at His Office Ready to Receive the Message.
- 292. What Evidence Relevant on this Question.

§ 286. **Must Make what Efforts to Deliver the Message.** — The company must make reasonable efforts to find the person addressed and to deliver the message to him.¹ Recurring to a principle already discussed,² we may conclude without hesitation, that the negligence of a telegraph company in failing to deliver a message renders it liable for such damage as is the direct and necessary result of such failure, without regard to the *degree* of such negligence.³

§ 287. **Diligence in Delivering Whether a Question of Law or Fact.** — Whether such reasonable efforts have been made, in a given case, will ordinarily be a

¹ *Western Union Tel. Co. v. Cooper*, 71 Tex. 507; s. c., 10 Am. St. Rep. 772; *Pope v. Western Union Tel. Co.*, 9 Bradw. (Ill.) 283.

² *Ante*, §§ 273, 274.

³ *Western Union Tel. Co. v. Broesche*, 72 Tex. 654; s. c., 10 S. W. Rep. 734; *Gulf, etc. R. Co. v. Wilson*, 69 Tex. 739; s. c., 7 S. W. Rep. 653.

question of fact for a jury. Such will be the case where its solution depends upon a variety of circumstances, or where the state of the evidence is such that fair-minded men might differ as to the conclusion to be drawn from it. But many cases may arise where the question, one way or the other, will be so plain that the judge may resolve it as a question of law, instructing the jury hypothetically and leaving them to resolve any disputed question of fact. Under the strict theory concerning the independence of juries which prevails in Texas, it seems that the question is always one for the jury;¹ but this cannot be affirmed as a general proposition of American jurisprudence.² It is therefore erroneous, in the view of that court—and the view is probably a sound one—for the court to decide this question by instructing the jury “that if a party has a known place of residence and a known place of business in a city, it is no part of the defendant’s duty to hunt said party up on the streets of the city, and the failure of the defendant’s messenger to hunt the party on the streets is no evidence of negligence on the part of the defendant.”³ Nor can the court declare to the jury, as matter of law, that going *twice* to the *office* of the addressee, a practicing physician, excuses the company for liability for damages, where his *residence* is near by, and he is well known in the town, and the messenger knows him and knows where his residence is, but does not go there to seek him, in a case where, although he had been in the

¹ *Western Union Tel. Co. v. Cooper*, 71 Tex. 507; s. c., 10 Am. St. Rep. 772.

² 2 Thomp. Tr. § 1530, *et seq.*

³ *Western Union Tel. Co. v. Cooper*, 71 Tex. 507; s. c., 10 Am. St. Rep. 772.

country, he had returned before the message was received at the telegraph office.¹ On similar grounds, an instruction that the company is required to deliver a message only *at the office* of the person addressed has been held erroneous.²

§ 288. **Cases where Ruled as a Question of Law.**— On the other hand, it has been ruled that, where a telegraph company pursues the customary and practical method as to the transmission and delivery of a message, and leaves it according to the address, upon being informed that the addressee lives there, it is not, as matter of law, guilty of negligence in so doing, although it turns out that the addressee does not live there, but lives at the same number on a street to which the same name as well applies.³ Obviously, the company cannot be heard to plead the insufficiency of its own service as an excuse. Accordingly, the fact that the business of a particular telegraph office is insufficient to justify the employment of a separate operator or messenger to deliver messages, does not excuse the company from liability for failure to deliver from that office a message which it has elsewhere received for transmission.⁴ In another case where the question was ruled as a question of law, the action was against a telegraph company under a statute,⁵ by the addressee of a message to recover the statutory penalty for failing to deliver it, and it appeared that two efforts were made by the company's manager to find the

¹ Western Union Tel. Co. v. Cooper, 71 Tex. 507.

² Pope v. Western Union Tel. Co., 9 Bradw. (Ill.) 233.

³ Deslottes v. Baltimore & O. Tel. Co., 40 La. An. 183; s. c., 3 South. Rep. 566.

⁴ Western Union Tel. Co. v. Henderson, 89 Ala. 510; s. c., 30 Am. & Eng. Corp. Cas. 615; 7 South. Rep. 419.

⁵ Rev. St. Ind. § 4177.

plaintiff, but without success; that the sender of the message was then interrogated, but failed to give a better address; but that, in fact, the addressee had resided for six years in the same house within a mile of the defendant's office. Here, it was held that the search was not sufficient to relieve defendant from liability, and that the plaintiff could not be bound by the negligence of the sender of the message, in the absence of anything to show that he was the plaintiff's agent.¹ Again, where a telegraph company, to whom a man offered to pay in advance for the delivery to him, at his residence, of a message which he expected would come addressed to him by an *assumed name*, refused to accept the payment, but entered his name in its register as that of a person entitled to receive messages so addressed, and promised to deliver such message when received, it was held liable for failure so to do.²

§ 289. **Delivery to Other Person than the Addressee.**—Another court, seemingly ruling the question as one of law, has held that, if a telegraph company, failing to learn the whereabouts of one to whom a message is sent, delivers it to his *wife*, and informs the sender, it performs its duty.³ Another court, evidently proceeding on the same conception, has held that there is an *implied authority* on the part of a *hotel clerk* to receive a dispatch for a guest, and that if the clerk is negligent in delivering it, the telegraph company is not at fault.⁴ But where

¹ *Western Union Tel. Co. v. McKibben*, 114 Ind. 511; s. c., 14 N. E. Rep. 894.

² *Milliken v. Western Union Tel. Co.*, 110 N. Y. 493; s. c., 1 L. R. A. 281; 18 N. E. Rep. 251; 18 N. Y. St. Rep. 328; 27 Cent. L. J. 577.

³ *Given v. Western Union Tel. Co.*, 24 Fed. Rep. 119.

⁴ *Western Union Tel. Co. v. Trissal*, 98 Ind. 566.

a telegraph message, addressed to "T. W. Pearsall & Co.," was delivered at the office of that firm in an envelope addressed "T. W. Pearsall," this was held *prima facie* evidence of negligence.¹

§ 290. **Where the Message is Addressed to one Person in the Care Another.**—But it has been held that where the message is addressed to one person in the care of another, and the messenger of the company tenders it to the person in whose care it is addressed, and he refuses to receive it, the company is not bound to look further for the purpose of finding the original addressee and delivering it to him.²

§ 291. **Plaintiff not Bound to Show that the Addressee was at his Office Ready to Receive the Message.**—As the company does not, as a matter of law, excuse itself for a non-delivery, by merely inquiring at the office of the addressee, it follows that the plaintiff is not bound to prove that the person to whom the message was addressed was at his office ready to receive it. If he was not at his office, so that it could be delivered to him, this is matter of defense to be shown by the company.³

§ 292. **What Evidence Relevant on this Question.**—Any *statements* made by persons to the messenger to whom the dispatch is delivered at its destination, for the purpose of finding and delivering it to the addressee, may apply, as to the whereabouts of the latter, have been held admissible in evidence, as bearing on the question of negligence

¹ Pearsall v. Western Union Tel. Co., 44 Hun (N. Y.), 532; s. c., 9 N. Y. St. Rep. 132.

² Western Union Tel. Co. v. Young, 77 Tex. 245; s. c., 13 S. W. Rep. 985.

³ Pope v. Western Union Tel. Co., 9 Bradw. (Ill.) 283.

in not finding him.¹ Where a telegraph company sought to excuse non-delivery on the ground that the receiver was an obscure person whom the messenger could not find, specimens of printed cards and letter heads, which he had used in his business as grocer, were regarded as pertinent to the issue, and admissible, especially after he had testified, without objection, that he so used them.²

¹ *Western Union Tel. Co. v. Cooper*, 71 Tex. 507; s. c., 10 Am. St. Rep. 772.

² *Gulf, etc. R. Co. v. Miller* (Tex.), 7 S. W. Rep. 653.

ARTICLE III.—IN CASES OF DELAY.

SECTION.

- 295. General View as to Liability for Delay.
- 296. Rule as to Urgent Messages.
- 297. What Disclosures of Urgency Sufficient.
- 298. What Delay Evidence of Negligence.
- 299. Reception at Small Station: Transmission through Repeating Offices.
- 300. Question how Affected by the Hours of Closing Company's Office.
- 301. What Excuses Insufficient.
- 302. Whether Plaintiff Injured by the Delay a Question for the Jury.
- 303. No Recovery of Damages Unless Delay Prejudicial.
- 304. Delay by Changing Route in Consequence of Bad Weather.

§ 295. **General View as to Liability for Delay.**—It is generally enacted by the statutes previously referred to, that each message shall be forwarded in its turn *as soon as received*.¹ This would, doubtless, be held to be a proper requirement, in the absence of statutory provisions.² The fact that these companies act in a public capacity is repugnant to the idea that any *preference* can be allowed in the transmission of dispatches; though it may be inferred from what follows in this chapter, that, in the absence of a statutory prohibition, the company would be justified in forwarding, ahead of their turn, dis-

¹ *Ante*, § 158.

² *Davis v. Western Union Tel. Co.*, 1 Cin. Superior Ct. 100, and cases *post*.

patches which, on their face, or from external information, appear to be very urgent. Under any theory, a *prompt delivery* is of the essence of the contract, and a failure in that respect is such a breach as will authorize the recovery of at least the consideration paid;¹ but whether it will authorize the recovery of more, depends upon a variety of circumstances elsewhere considered.² Here, as elsewhere, except in actions for a statutory penalty, the plaintiff must show both *negligence* or *willful misconduct* and *damages*: where the result to him would have been the same if the delay had not supervened, he cannot recover more than the cost of sending the message.³

§ 296. **Rule as to Urgent Messages.**—Laying out of view the question to what extent, if any, the company will be justified in forwarding out of their turn messages of peculiar urgency, it is under the undoubted obligation to forward all dispatches with *reasonable diligence*, and this would ordinarily imply greater promptness in the case of messages known to be urgent than in the case of others. From this, the conclusion reasonably follows that if the sender of a message of great or peculiar importance would hold the company responsible for failing to deliver it more promptly than would suffice in other cases, he must so word the message

¹ *Western Union Tel. Co. v. Adams*, 75 Tex. 531; s. c., 6 L. R. A. 844; 12 S. W. Rep. 857.

² *Ante*, § 158, *et seq.*

³ Thus, it has been held that, although there may have been negligence on the part of the servants of a telegraph company in delivering a message calling a physician to attend a patient, yet, if it could not have been delivered in time for him to render any assistance, no damages can be recovered. *Western Union Tel. Co. v. Cooper*, 71 Tex. 507; s. c., 1 L. R. A. 728; 9 S. W. Rep. 598.

that its importance will be obvious to the operator, or otherwise give notice of its important character.¹ Such information being given, the company will be liable for all damages which are the proximate result of a failure seasonably and properly to transmit the message.² Here, as in most other cases, the diligence which fills the measure of what the law denominates *reasonable care*, is proportioned to the urgency of the occasion. It cannot, therefore, be governed by general rules, but, on the contrary, general rules must in some cases yield to it. It is, therefore, clear that such a company cannot excuse its failure to exercise such diligence by showing that the particular dispatch was transmitted in accordance with its own *rules*, since it would be absurd to allow a corporation to make rules for its own conduct that would excuse its own negligence. The by-laws and other rules of a corporation are void unless they are *reasonable*, and such a rule would be unreasonable.³ On the other hand, the fact that the message is not so worded as to apprise the agent of the company of its urgency does not

¹ *Belun v. Western Union Tel. Co.*, 7 Reporter, 710; s. c., 8 Cent. L. J. 445; 11 Ch. Leg. N. 276; *Candee v. Western Union Tel. Co.*, 34 Wis. 471; *United States Tel. Co. v. Gildersleve*, 29 Md. 232; *Baldwin v. United States Tel. Co.*, 45 N. Y. 744, 749.

² *Sprague v. Western Union Tel. Co.*, 6 Daly (N. Y.), 209; *United States Tel. Co. v. Wenger*, 55 Pa. St. 262; *Bryant v. American Tel. Co.*, 1 Daly (N. Y.), 575; *First National Bank v. Western Union Tel. Co.*, 30 Ohio St. 555; *Brown v. Western Union Tel. Co. (Utah)*, 21 Pac. Rep. 988; *Western Union Tel. Co. v. Sheffield*, 71 Tex. 570; s. c., 10 S. W. Rep. 752; *Western Union Tel. Co. v. Valentine*, 18 Ill. App. 57.

³ Two cases hold that, when a dispatch received by a telegraph company for transmission demonstrates upon its face extreme urgency that it shall be delivered immediately, the degree of diligence to be exercised is in proportion to the exigencies of the case, as shown by the telegram, regardless of any rules of the company. *Brown v. Western Union Tel. Co. (Utah)*, 21 Pac. Rep. 988; *Pegram v. Western Union Tel. Co.*, 97 N. C. 57; s. c., 2 S. E. Rep. 256.

relieve the company from liability for a negligent delay in delivering it, provided the delay were such as would be evidence of negligence in the case of a message not specially important.

§ 297. **What Disclosures of Urgency Sufficient.**—

It is a rule of law, applicable in many cases, that a party is chargeable with knowledge of a fact where he has such notice as would put a reasonable or prudent man on inquiry.¹ On a similar principle, in order to bring a case within the rule we are considering, the message need not disclose its urgency in a circumstantial manner: it will be sufficient if it shows it to a common intent, so to speak. For instance, a message summoning a woman to the bedside of a dying person need not disclose on its face the fact that she is the mother of the dying person.² Nor need a message in the words: "You had better come and attend to your claim at once," give the names of the debtors against whom the addressee of the message has claims.³

§ 298. **What Delay Evidence of Negligence.**—A delay of *three days* in delivering a message makes out a *prima facie* case of negligence against the telegraph company, such as casts upon it the burden of explaining; and, where no excuse is offered, the court trying the facts is justified in finding that the company is negligent.⁴ In like manner, it has been held that a delay of *several hours* in transmit-

¹ *Lodge v. Simonton*, 2 Penn. & W. (Pa.) 439; s. c., 23 Am. Dec. 36; and note 23 Am. Dec. 47.

² *Western Union Tel. Co. v. Feegles*, 75 Tex. 537; s. c., 12 S. W. Rep. 860.

³ *Western Union Tel. Co. v. Sheffield*, 71 Tex. 570; s. c., 10 S. W. Rep. 752.

⁴ *Harkness v. Western Union Tel. Co.*, 73 Iowa, 190; s. c., 5 Am. St. Rep. 672.

ting a message requiring only from five to fifteen minutes, is unreasonable, and, when shown in an action to recover a *statutory penalty*, places the burden of explaining it on defendant.¹ Nor would the fact that *one operator* could not attend to the message in less time constitute an explanation, as the company would be bound to employ more operators.² Where a message ordering a quantity of hams was *mislaidd* by the company's agent for *seven days*, and then sent forward, and the plaintiff acted upon the order, this was held such *gross negligence* as would cast the loss upon the company, although there was in the message blank a stipulation exempting the company from liability beyond the price of the message.³ Where the language of the message was: "Come in haste, your wife is at the point of death," and the place of business of the addressee was well known, and was within a short distance of the office of the company, and there was a delay of *eight days*, whereby he was prevented from attending his wife's funeral, it was held that he was entitled to maintain an action for damages.⁴ On the other hand, a dispatch delivered in its regular order, and within *thirty minutes* from the time when received at the office of the city of delivery, is seasonably delivered.⁵

§ 299. Reception at Small Station—Transmission Through Repeating Offices.—But it has been well reasoned that it would be unjust to expect that a

¹ Western Union Tel. Co. v. Scirele, 103 Ind. 227.

² *Ibid.*

³ Mowry v. Western Union Tel. Co., 51 Hun (N. Y.), 126; s. c., 20 N. Y. St. Rep. 626; 4 N. Y. Supp. 666.

⁴ Young v. Western Union Tel. Co., 107 N. C. 370; s. c., 9 L. R. A. 669; 42 Alb. L. J. 518; 11 S. E. Rep. 1044.

⁵ Jullan v. Western Union Tel. Co., 98 Ind. 327.

message left for transmission with a telegraph company at a *small station*, should be forwarded and delivered at its destination as quickly as though it had been left at a large office. At a small station, it is said that it is not the duty of the company to keep more than one operator, and if a message is left with a messenger during the operator's absence, and the message is forwarded on the operator's return after a reasonable absence, the company is not guilty of negligence. Moreover, if the usual line of business between two points is through a *repeating* office, the company is entitled to a reasonable time for the delay on account of other business at such repeating office.¹

§ 300. **Question how Affected by the Hours of Closing Company's Office.**—Whether the company can be heard to offer the fact that its office was closed as an excuse for delay, depends upon the question whether it was *reasonable* that its office should be closed at the particular time; otherwise, it would be allowed to urge its own unreasonable conduct as an excuse for its own negligence—in other words, to take advantage of its own wrong.' It has been held that a telegraph company is not excused from liability for delay in delivering a message, by the mere fact that its office at the place of delivery was closed at the time the message was received at the place of sending.' But it is a mere judicial assumption to say, as was said in one case, that the employees in a telegraph office are not required to know the hour at which

¹ *Behm v. Western Union Tel. Co.*, 8 Biss. (U. S.) 131.

² *Ante*, § 185.

³ *Western Union Tel. Co. v. Broesche*, 72 Tex. 654; s. c., 10 S. W. Rep. 734.

an office of the company in another city closes.¹ On the contrary, it is an obvious suggestion that, in any properly regulated telegraph system, the offices would be classified, and there would be a uniform time established for the closing of those of each class, of which time every agent receiving dispatches would be apprised. It is probable that there is not a receiving agent in the postal telegraph service of France or Germany that does not know the hour of closing of every office in the republic or empire. If such an agent receives an urgent dispatch after the office to which it is to be sent is closed for the day, and, nevertheless, undertakes to get it through, this may of itself be evidence of negligence. Where the action was for the penalty given by a statute² for failing properly to transmit messages "during the usual office hours," and it appeared that the message was received within office hours, and promptly transmitted to another office, where it was not delivered until noon the next day, it was held that the company was not liable, provided the office hours at the last named office were *reasonable*.³

§ 301. **What Excuses Insufficient.**—It has been held no excuse for delay in transmitting a message that an agent at an intermediate point was in doubt as to its proper destination, the message being addressed to "Wallace" instead of "Wallis," there being no place in the State of the former name, if he knew of the existence of the latter town, and failed to send it to that point. If, in such a case, the error in the name was chargeable to the agent.

¹ Given *v.* Western Union Tel. Co., 24 Fed. Rep. 119.

² Ind. Rev. Stat. 1881, § 4176.

³ Western Union Tel. Co. *v.* Harding, 103 Ind. 505 (Howk, J., dissented).

who received the message from the sender, the company would be liable for *his* negligence, and regardless of the diligence used by the agent at the intermediate office to discover the correct destination.¹

§ 302. **Whether Plaintiff Injured by the Delay a Question for the Jury.**—Whether the plaintiff was injured by the delay, and, if so, to what extent, is always a question of fact for the jury, but always with the proviso that there is *evidence* tending to show such injury. It was in this sense that one court held that where the message summoned a physician to a patient, it was for the jury to determine whether the patient was injured by the delay, and whether the result would have been different had the dispatch been delivered.² Thus, where the message contained information of the probable death of plaintiff's wife, and the only means by which, if the dispatch had been duly delivered, the plaintiff could have arrived before her death was by a train which passed at a distance of fifteen miles from the point to which the message should have been sent, within two hours and fifteen minutes after the earliest time at which he could have received the message, it was for the jury to decide whether he could have reached her while living, and therefore whether he was injured by the delay.³

§ 303. **No Recovery of Damages unless Delay Prejudicial.**—Unless the action is for a statutory penalty,⁴ there can, of course, be no recovery of damages unless the delay is shown to have been *injurious* to

¹ *Beasley v. Western Union Tel. Co.*, 39 Fed. Rep. 181.

² *Brown v. Western Union Tel. Co. (Utah)*, 21 Pac. Rep. 988.

³ *Beasley v. Western Union Tel. Co.*, 39 Fed. Rep. 181.

⁴ *Ante*, § 158, *et seq.*

the plaintiff in a legal sense. Thus, it has been held that a delay of *six hours*, in delivering a message announcing that the sender would be there that evening to attend the funeral of his mother, did not entitle him to recover damages, where it appeared that he could not have arrived in any event in time to attend the funeral unless it was postponed, and those in charge received the message before it took place, and did not see fit to postpone it.¹ So, where the action was for the failure to deliver a message summoning a physician to attend the plaintiff's wife, it was held that the plaintiff could not recover damages, in the absence of evidence tending to show that her life might have been saved had the message been promptly delivered.² Possibly another decision may be referred to the same principle, where it was held that a telegraph company is not liable for loss resulting from delay in the delivery of a message relative to an advance in the price of cotton, when it appears that the message was the voluntary act of a third party under no obligation to send it, and having no connection with the cotton in question.³

§ 304. **Delay by Changing Route in Consequence of Bad Weather.**—Where the condition of the weather prevented the company from sending a message by the usual and most direct route, it is not chargeable with negligence by sending the next best available route.⁴

¹ *Western Union Tel. Co. v. Andrews*, 78 Tex. 305; s. c., 14 S. W. Rep. 641.

² *Western Union Tel. Co. v. Kendzora*, 77 Tex. 257; s. c., 13 S. W. Rep. 986.

³ *Frazer v. Western Union Tel. Co.*, 84 Ala. 497; s. c., 4 South. Rep. 831.

⁴ *Beasley v. Western Union Tel. Co.*, 39 Fed. Rep. 181.

CHAPTER XI.

DAMAGES IN ACTIONS AGAINST TELEGRAPH COMPANIES.

- Article I. **RULE IN HADLEY V. BAXENDALE.**
- Article II. **PROXIMATE AND REMOTE DAMAGES.**
- Article III. **LOSS OF PROFITS.**
- Article IV. **CIPHER AND UNINTELLIGIBLE DISPATCHES.**
- Article V. **INJURY TO THE FEELINGS.**
- Article VI. **MISCELLANEOUS HOLDINGS.**

ARTICLE I.—RULE IN HADLEY V. BAXENDALE.

SECTION.

- 310. The Measure of Damages Governed by General Rules.
- 311. Rule in Hadley v. Baxendale: Damages in Contemplation of the Parties.
- 312. That Rule as Explained in a Leading Case in New York.
- 313. Special Circumstances must be Communicated to the Company.
- 314. English Case in Illustration of the Rule.
- 315. Agents who Receive Dispatches for Transmission are Agents to Receive Such Information.
- 316. Conclusions Flowing from these Rules.

§ 310. **The Measure of Damages Governed by General Rules.**—The measure of damages, in actions against telegraph companies for failing in the performance of the duties which they undertake, is one of the most difficult of questions arising with reference to this agency, owing to the peculiar nature

of the undertaking. The general rule is that a telegraph company, receiving a message for immediate transmission and delivery, is bound to use *ordinary care* in endeavoring to make such delivery as nearly *immediate* as practicable; and, upon failure to do so, will be liable to the sender for such actual damage in loss of time, traveling expenses, etc., not exceeding the amount sued for, as he may be found to have sustained in consequence of the delay in delivering of the message.¹

§ 311. **Rule in *Hadley v. Baxendale*: Damages in Contemplation of the Parties.**—American judicial authority is generally, though not universally agreed, that the rule of damages to be applied in such actions is that laid down in the leading English case of *Hadley v. Baxendale*.² In that celebrated case it appeared that the plaintiffs, owners of a steam-mill, broke a shaft, and, desiring to have another made, left the broken shaft with the defendant, a *carrier*, to take to an engineer to serve as a model for a new one. At the time of making the contract the defendant's clerk was informed that the mill was stopped, and that the plaintiffs desired the broken shaft to be sent immediately. Its delivery was delayed, however, and the new shaft kept back in consequence. The plaintiffs brought their action for a breach of this contract with the carrier, and they claimed, as special damages, the *loss of profits* while the mill was kept idle. But, because it was not made to appear that the defendant was informed that the want of the shaft was the only thing that was keeping the mill from

¹ *Bliss v. Baltimore, etc. Tel. Co.*, 30 Mo. App. 103.

² 9 Exch. 341; s. c., 26 Eng. Law & Eq. 398.

operating, it was held that he could not be made responsible to the extent claimed; and the court, in delivering its judgment, said: "We think the proper rule, in such a case as the present, is this: where two parties have made a contract which one of them has broken, the damages which the other party ought to receive, in respect of such breach of contract, should be either such as may fairly and substantially be considered as arising naturally, *i. e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which a contract was actually made were *communicated* by the plaintiff to the defendant, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of a contract under these special circumstances so known and communicated. But, on the other hand, if those special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances of such a breach of contract. For, had the special circumstances been known, the parties might have expressly provided for the breach of contract by special terms as to the dam-

ages in that case, and of this advantage it would be very unjust to deprive them."¹

§ 312. **That Rule, as Explained in a Leading Case in New York.**—In what may, perhaps, be regarded as a leading American case, the same rule of damages was thus laid down by SELDON, J.: "The party injured is entitled to recover all his damages, including gains prevented as well as losses sustained, and this rule is subject to but two conditions: The damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract; that is; must be such as might naturally be expected to follow its violation; and they must be certain, both in their nature and in respect to the cause from which they proceed." "The cardinal rule," said EARL, C. J., in a statement of the rule which has never been surpassed, "undoubtedly is that the one party shall recover all the damages which has been occasioned by the breach of contract by the other party. But this rule is modified in its application by two others. The damages must flow directly and naturally from the breach of contract, and they must be certain, both in their nature and in respect to the cause from which they proceed. Under this latter rule, spec-

¹ The following, among many other cases, where the action was against telegraph companies for errors or defaults in the transmission of messages, affirm the leading proposition of the above case, that such damages are recoverable as may fairly be supposed to be in the contemplation of the parties as likely to flow from a breach of the undertaking. *McColl v. Western Union Tel. Co.*, 44 N. Y. Super. 487; s. c., 7 Abb. N. C. (N. Y.) 151; *Candee v. Western Union Tel. Co.*, 34 Wis. 471; s. c., 17 Am. Rep. 452; *First Nat. Bank v. Western Union Tel. Co.*, 30 Ohio St. 555; s. c., 27 Am. Rep. 485; *Western Union Tel. Co. v. Graham*, 1 Colo. 230; s. c., 9 Am. Rep. 136; *Abeles v. Western Union Tel. Co.*, 37 Mo. App. 554.

² *Griffin v. Colver*, 16 N. Y. 489; s. c., 69 Am. Dec. 718.

ulative, contingent and remote damages, which cannot be directly traced to the breach complained of, are excluded. Under the former rule, such damages are only allowed as may be fairly supposed to have entered into the contemplation of the parties when they made the contract, as might naturally be expected to follow its violation. It is not required that the parties *must* have contemplated the actual damages which are to be allowed. But the damages must be such as the parties may *fairly be supposed* to have contemplated when they made the contract. Parties entering into contracts usually contemplate that they will be performed, and not that they will be violated. They very rarely actually contemplate any damages which would flow from any breach, and very frequently have not sufficient information to know what such damages would be. As both parties are usually equally bound to know and be informed of the facts pertaining to the execution or breach of a contract which they have entered into, I think a more precise statement of this rule is, that a party is liable for all the direct damages which both parties to the contract would have contemplated as flowing from its breach, if, at the time they entered into it, they had bestowed proper attention upon the subject, and had been fully informed of the facts."¹ This principle has been thus well stated by ALLEN, J., in another case in the same State: "Whenever special or extraordinary damages, such as would not naturally or ordinarily follow a breach, have been awarded for the non-performance of contracts, whether for the sale or carriage of goods, or

¹ Leonard v. New York, etc. Tel. Co., 41 N. Y. 544; s. c., 1 Am. Rep. 446, 452.

for the delivery of messages by telegraph, it has been for the reason that the contracts have been made with reference to peculiar circumstances known to both, and the particular loss has been in the contemplation of both, at the time of making the contract, as a contingency that might follow the non-performance. In other words, the damages given by way of indemnity have been the natural and necessary consequences of the breach of contract, in the minds of the parties, interpreting the contract in the light of the circumstances under which, and the knowledge of the parties of the purposes for which it was made, and when a special purpose is intended by one party, but is not known to the other, such special purpose will not be taken into account in the assessment of damages for the breach. The damages in such cases will be limited to those resulting from the ordinary and obvious purpose of the contract."¹

§ 313. **Special Circumstances must be Communicated to the Company.**—A negative brief statement of this rule is, that there can be no recovery for a loss arising from special circumstances not communicated to the company at the time when the dispatch is delivered to it for transmission, or before it has assumed the undertaking, or before the time has elapsed within which it has become impossible for it to perform it so as to avoid loss.² Unless, therefore, the language of the dispatch, as delivered to the agent of the company, shows its importance or urgency, this must be specially communicated;

¹ *Baldwin v. United States Tel. Co.*, 45 N. Y. 744; s. c., 6 Am. Rep. 165, 169.

² That a loss arising from uncommunicated special circumstances is not an element of damage for failure to transmit a telegram, see *Western Union Tel. Co. v. Way*, 83 Ala. 542; s. c., 4 South. Rep. 844.

otherwise no more than the cost of sending the message which the sender has paid to the company can be recovered.¹

§ 314. **An English Case in Illustration of the Rule.**—In an English case, the plaintiff had contracted to deliver a lot of shoes in London on February 3d, 1871, intended for the use of the French army. On delivering them to the Midland Railway Company for transportation, he gave information to the latter company that the contract required a delivery on that day, but did not state the special nature of the contract. In consequence of the delay in the carriage of the shoes, the contract could not be complied with, and the goods were refused. The market price had not varied between the day when the shoes were due and that on which they were received; but it was below the contract price, of which the company was ignorant. It was held that the company was not liable for this difference, it not having been advised of the special circumstances which led to the special loss.²

§ 315. **Agents Who Receive Dispatches for Transmission are Agents to Receive Such Information.**—It would seem, from the nature of the business of telegraph companies, that the agent of such a company, appointed to receive messages for transmission, should be held to be its agent for the purpose of receiving any communication which the sender of a message may desire to make to the company as to the meaning of the contents of the message, or the importance of its accurate and prompt transmission. The company holds out such agents to the public as

¹ *McColl v. Western Union Tel. Co.*, 44 N. Y. Super. 487.

² *Horne v. Midland R. Co.* L. R. 7 C. P. 583, commented on in Wood's *Mayne on Damages*, § 34.

properly qualified to make contracts to transmit messages. They are in a position to know of any reason which exists why a message may not be promptly transmitted. They must have sufficient intelligence to understand the explanation which the sender desires to give. From their position they have more easy access to their superior officers than he has; and, therefore, if it become necessary, can more easily communicate with them. If a question should arise as to the propriety of accepting a message for transmission, at the time when it is tendered, it would be comparatively easy for them to telegraph for and receive instructions touching the matter; while, if the contrary were the rule, it would result that the sender of an important message, in order to protect himself, must first communicate with the officers of the company, who may be in a distant city, explain to them the nature and importance of the message, and receive from them permission to transmit it, by which time the purposes of his telegram may have entirely failed. It is believed that all the decisions which adopt the rule of *Hadley v. Baxendale* proceed on the tacit assumption that the agent for the purpose of receiving the dispatch for transmission is the agent with implied authority to receive such a communication from the sender of the dispatch.

§ 316. **Conclusions Flowing from these Rules.**—An attentive survey of the cases in which these rules have been applied will lead us to the following conclusions: 1. In all cases where actual damages—that is, damages beyond those stipulated against in the message—are recoverable, the company will be liable for all damages which are the direct result of any

affirmative action which the person addressed was induced to take by the erroneous transmission of the message, provided that, from the terms of the message itself, or from information communicated to the defendant at or before the time it was delivered to the defendant, or otherwise, the company was apprised that the character of the communication was such as might lead to such action.¹ 2. Where the message on its face was designed to *prevent* certain contemplated action, and the company was, from its terms or otherwise, formally apprised that such was its purpose, yet, in consequence of the default of the company in failing to transmit it correctly, or in failing to deliver it within a reasonable time, such contemplated action was not prevented, the company will be liable for the resulting damages.² 3. But that the company will not be liable in any case for damages from the gain of advantages or profits or the prevention of disadvantages or losses, which *might or might not* have taken place, according to uncertain contingencies, if the dispatch had been correctly transmitted, on the one hand, or seasonably delivered on the other.³

¹ *Post*, § 335, *et seq.*

² *Post*, § 323.

³ *Post*, § 346, *et seq.*

ARTICLE II.—PROXIMATE AND REMOTE DAMAGES.

SECTION.

- 318. Only Direct or Proximate Damages Recoverable.
- 319. Damages Due to the Operation of an Intervening Cause.
- 320. Intervening Fraud of a Third Person.
- 321. Non-Delivery of Message Asking for Information.
- 322. Error in Message Notifying Date of Trial of a Cause.
- 323. Non-Delivery of Message Requesting Postponement of a Judicial Trial.
- 324. Other Instances of Damages too Remote.
- 325. Loss of Fee by a Professional Man.
- 326. Losing a Chance of Obtaining Employment.
- 327. Plaintiff Failing to Obtain Employment.—Rule under Indiana Statute.
- 328. The Same Subject: Nebraska Statute.
- 329. Loss of Opportunity to Save Debt by Attachment..
- 330. Operator Fraudulently Withholding Message Announcing Failure of Bank.
- 331. Right to Recover the Cost of Sending Message.

§ 318. **Only Direct or Proximate Damages Recoverable.**—If we keep in mind the proposition, applicable in every case except where the damages are liquidated by statute or by the contract of the parties, or where exemplary damages are given, that the damages must be the natural and direct or proximate consequences of the default complained of, we shall have the *rule* by which to solve the difficult question as to the measure of damages which arise in actions of this kind;¹ but we shall

¹The expression is constantly met with in judicial opinions on this subject, that the sender of a telegram is entitled to such damages as are

not be prepared to make an intelligent application of it, unless we give attention to the precedents established by the most authoritative legal judgments. Indeed, the rule in *Hadley v. Baxendale*¹ is one of the familiar forms of expressing the well-known theory of *proximate and remote cause* when applied to the question of the damages resulting from the breach of contracts; and it has been explained by saying that if the consequences resulting to the sender of the message, from the failure of the company to deliver it, are not the ordinary result of such failure, and could not, therefore, have been in the contemplation of either party when the company undertook to transmit it, the company will not be liable for such consequences, but only for nominal damages for its default.²

§ 319. **Damages Due to the Operation of an Intervening Cause.**—The maxim *causa proxima non remota spectatur* applies where the telegraph company is in default, but where its default is made injurious to a party only by the operation of some other *intervening cause*. In such a case, the application of the rule embodied in the above maxim would relieve the company from liability. Thus, where a telegram was sent by the defendant's line to the plaintiff, asking for \$500, and, by the negligence of the defendant's employees, the message was changed to \$5,000, which sum the plaintiff sent

the *natural and proximate* consequence of the company's negligence. *Pegram v. Western Union Tel. Co.*, 100 N. C. 28; *Western Union Tel. Co. v. Edsall*, 74 Tex. 329; s. c., 12 S. W. Rep. 41; *Western Union Tel. Co. v. Broesche*, 72 Tex. 654; s. c., 10 S. W. Rep. 734; *Gulf, etc. R. Co. v. Wilson*, 69 Tex. 739; s. c., 7 S. W. Rep. 653; *Parks v. Alta California Tel. Co.*, 13 Cal. 422; s. c., 73 Am. Dec. 589.

¹ 9 Exch. 341; s. c., 26 Eng. Law & Eq. 398; *ante*, § 311.

² *Smith v. Western Union Tel. Co.*, 83 Ky. 104; s. c., 4 Am. St. Rep. 126.

to the person who had telegraphed, and he absconded with it, it was held, in an action against the telegraph company, by the New York Court of Appeals (reversing the lower court), that the defendant's negligence was not the proximate cause of the loss, as the embezzlement of the money did not naturally result therefrom, and could not reasonably have been expected.¹ We may, however, take leave to doubt the soundness of another decision, which charged the telegraph company with liability for a negligent failure to deliver a message from a son to his mother, stating that he was very sick and requesting her to come to him immediately, where the mother was unable to go on the first train which departed after receiving the message, which train would have taken her there in time, but was only able to go on a later train which would have taken her there in time but for the fault of the railroad company; such intervening fault being, in the opinion of the court, no defense to the telegraph company when sued for its negligent failure to deliver the message.²

§ 320. **Intervening Fraud of a Third Person.**— Suppose that there is offered to a bank for *discount a draft* drawn upon a distant firm. Suppose that the bank, through its cashier, before doing so, writes a letter to a correspondent at the place where the firm is resident, making such inquiries as it deems needful, in order to determine whether it will discount the draft or not. Suppose that in this letter the bank directs its correspondent, if everything is satisfactory *not to telegraph*; but otherwise, to telegraph.

¹ Lowery v. Western Union Tel. Co., 60 N. Y. 198.

² Loper v. Western Union Tel. Co., 70 Tex. 689; s. c., 8 S. W. Rep. 600.

Suppose further that the correspondent, after making inquiries, sends to the bank a dispatch like the following: "Parties will accept if bill of lading accompanies the draft." Suppose that the telegraph company negligently fails to deliver this dispatch at all, and that, in consequence of this negligence, the bank, not getting the telegraphic information which it advised its correspondent to send in case anything was unsatisfactory, discounts the draft. Suppose, further, that the drawer of the draft, as soon as he obtains the money, disappears, and that when the draft is presented, not being accompanied by a bill of lading, and the drawer having no funds in the hands of the drawees, it is dishonored. On these facts, can the bank maintain an action against the telegraph company for more than nominal damages, or for anything at all? It has been held, on substantially these facts, that the telegraph company is not liable to the bank for substantial damages, on the ground that the damages were too remote. They were produced by the *intervening wrong of a third person*, to-wit, a person who was neither the sender of the dispatch nor the person to whom it was sent, but an outside person about to have a business transaction with the bank. The name of this man was Lowshe, and the court said of what he did: "Clearly the failure in the message was not the moving cause that induced Lowshe to obtain the discounts and pocket the money; neither would the delinquency of the telegraph company have occasioned any damage, had Lowshe evidenced that integrity which, in a virtuous mind, would have induced the return of the money to the bank. The loss was occasioned by two causes: the short-coming

of the telegraph company in not delivering the message, and the still shorter coming of Lowshe in appropriating to himself what belonged to somebody else." And it was held that the plaintiff was entitled to recover nominal damages only.¹ The decision of the court is supported on another ground, stated in a number of cases cited in the opinion, to-wit, the rule in *Hadley v. Baxendale*, elsewhere discussed.² There was nothing in the dispatch which the company failed to deliver which had a tendency to apprise it that some irresponsible person was about to draw a draft on somebody, and that such a state of facts existed that the bank would cash the draft unless this dispatch was received, and that when the irresponsible person thus obtained the money of the bank he would run away with it.

§ 321. **Non-Delivery of Message Asking for Information.**—The results which flow from the non-delivery of messages asking for information upon which to base some undisclosed contemplated action, in consequence of which non-delivery no reply is sent and the information is not received, must be placed in the category of remote, contingent or problematical damages, which are not recoverable. They fall within the rule elsewhere stated,³ that the damages will be limited to those resulting from the ordinary and obvious purpose of the message.⁴

¹ *First Nat. Bank v. Western Union Tel. Co.*, 30 Ohio St. 555; s. c., 27 Am. Rep. 485, 491.

² *Ante*, § 311.

³ *Ante*, § 311.

⁴ *Hadley v. Baxendale*, 9 Exch. 341; *Cory v. Thames Iron Works, L. R.* 3 Q. B. 181; *Leonard v. New York, etc. Tel. Co.*, 41 N. Y. 544; s. c., 1 Am. Rep. 446; *Messmore v. New York, etc. Co.*, 40 N. Y. 422; *United States Tel. Co. v. Gildersleve*, 29 Md. 232; *Griffin v. Colver*, 16 N. Y. 489, 493; *Landsberger v. Magnetic Tel. Co.*, 32 Barb. (N. Y.) 530.

Applying this rule, a judgment for \$1,200 damages was reversed, where the case was as follows: A telegram was presented at Ogdensburg, New York, for delivery at Rouseville, in Pennsylvania, as follows: "Telegraph me at Rochester what that well is doing." The telegram was misdelivered, and was not received until several days afterwards. Not hearing from the person to whom it was sent, the sender accepted a previous offer of \$3,800 for his interest in the oil well referred to in the telegram. A few minutes after this sale was effected, the plaintiff received the following telegram from the person of whom the previous inquiry had been made: "Well flowing eighty barrels. New well pumping twenty-five barrels. Can sell your interest for \$5,000. Telegraph me refusal for ten days. Have Perry transfer to me." Evidence was admitted, over the defendant's objection, that the plaintiff told the operator at Ogdensburg, when he delivered the first telegram, that he had received an offer of \$3,800 for the property and wanted to get an answer from Rouseville to prevent his selling at that price, if there were more favorable prospects in regard to the property. In addition to the reasons founded on the rule in *Hadley v. Baxendale*,¹ as above stated, the court gave what in this case would seem to be a better reason, in the following language in its opinion, delivered by ALLEN, J.: "Indeed, I doubt if under any construction of the contract, or in any view of the rights and obligations of the parties, such damages could be recovered by the plaintiffs, as the result of the non-delivery of the message. They are quite too remote, and depend upon too

¹ *Ante*, § 311.

many contingencies. Had the message been received, the agent might or might not have answered it; and what the answer would have been cannot certainly be known. The answer might or might not have been received by the plaintiffs at Rochester, and, if received, it is conjectural what might have been the action of the plaintiffs thereon. Again, the sale without an attempt to obtain further information was the voluntary act of the plaintiffs, neither caused nor encouraged by the act or default of the defendant. The mere assertion to the operator at Ogdensburg, had he been the agent of the defendant, that they would sell if no answer was received to the message, did not relieve them of the duty resting upon all persons, for whose losses others may be liable to respond, to take all reasonable measures to avoid loss or to diminish the damages that may occur.'"

§ 322. **Error in Message Notifying Date of Trial of a Cause.**—Where the plaintiff was under a recognizance to appear as a witness in a cause pending in a court at a distant place, and counsel in the case deposited with the telegraph company a dispatch notifying him that the cause was set for trial on the 17th of the month, but the dispatch, as delivered to the plaintiff, read the 7th,—it was held that he was entitled to recover his reasonable expenses in going to and from the trial, and the value of his time; but that, there being no evidence that the company had notice of special circumstances connected with the sending of the message, it was not liable for loss to plaintiff resulting from the

¹ *Baldwin v. United States Tel. Co.*, 45 N. Y. 744; s. c., 6 Am. Rep. 165, 172.

necessity of shutting down his mill, idleness of his teams, etc., during his absence.¹

§ 323. **Non-Delivery of a Message Requesting Postponement of a Judicial Trial.**—In a case in New York, the plaintiff entrusted to the defendant, a telegraph company at the city of New York, for transmission by telegraph, a message directed to his attorney at Buffalo, as follows: "Hold my case till Tuesday or Thursday. Please reply." The plaintiff, at the same time, informed the servant of the company who had charge of the receipt of messages for transmission, that the message related to a cause in Buffalo that was expected to be called, and that it was of great importance that the party sending it should get a reply the next day, in order that he might know when to go to Buffalo. The message was never sent at all. The plaintiff waited for a reply and received none; and, supposing that an adjournment of the case could not be procured, went with his counsel to Buffalo, to attend the trial, and found that the case had been adjourned. He was, accordingly, obliged to go again to Buffalo with his counsel to attend at the trial at the adjourned day. It was held that he was entitled to recover as damages, not only the *expense of himself and counsel* on the first journey to Buffalo, but also the *fee* which he was obliged to pay his counsel for going there the next time. The court reasoned that it was a natural inference for the plaintiff to draw from the failure to receive a reply, that the party addressed was absent from Buffalo, and that his message had failed to accomplish its object, for

¹ Western Union Tel. Co. v. Short, 53 Ark. 434; s. c., 9 L. R. A. 744; 9 Rall. & Corp. L. J. 11; 14 S. W. Rep. 649.

which reason the attendance of himself and counsel at Buffalo was required. "This was a more natural and reasonable inference to draw, and to act upon, than to infer that the reason why no reply had been received was because the defendant had not sent the message, especially as the object and importance of it had been made known to the telegraph company when it was delivered to him for the transmission." ¹

§ 324. **Instances of Damages too Remote.**—The damages have been held too remote, contingent, problematical, and hence not recoverable, in the following cases: Where, owing to the delay of a telegraph company in delivering a dispatch, a barge did not reach a lot of staves in time to prevent their being *lost by a flood*; ² where there was delay in delivering a telegram, announcing the death of a person, without giving the company *notice* of his relationship to the person addressed, in consequence of which the person, a brother of the deceased, failed to attend the funeral; ³ where the plaintiff, by reason of the non-delivery of the message, was obliged to take a *rough vehicle* instead of the *family carriage*, in consequence of which he received sundry *bruises*. ⁴ So, it has been held that a telegraph company, failing to deliver a message ordering a *saw*, is not liable for damages in consequence of a *mill lying idle* for want of it, where the message did not show for whom the article was intended, and

¹ *Sprague v. Western Union Tel. Co.*, 6 Daly (N. Y.), 200; s. c., affirmed on this opinion, 67 N. Y. 590.

² *Bodkin v. Western Union Tel. Co.*, 31 Fed. Rep. 134.

³ *Western Union Tel. Co. v. Brown*, 71 Tex. 723; s. c., 2 L. R. A. 766; 10 S. W. Rep. 32.

⁴ *McAllen v. Western Union Tel. Co.*, 70 Tex. 243; s. c., 7 S. W. Rep. 715.

the telegraph agent did not *know* that the mill was lying idle on that account.¹ So, where the plaintiff sent a telegram requesting R. to meet him at C., on Saturday night, and the dispatch was not delivered, a petition in an action against the telegraph company, alleging that by his negligence he was put to expense in hiring a conveyance to go from C. to R.'s home, and back again; that by loss of time he failed to meet important engagements; and that, by reason of exposure, his health was greatly impaired was held bad on demurrer, the damages being too remote, conjectural, and not in contemplation of the parties as a consequence of a breach of the contract.² So, the loss of a note which plaintiff avers his father *would have given him*, had he been able to see him before his death, has been held a consequence too remote to sustain a claim for damages.³

§ 325. **Loss of Fee by a Professional Man.**—Where a telegram is sent to a person summoning him to perform a certain service, and, in consequence of its not being seasonably delivered, he loses the job, so to speak, the measure of his damages seems to be what he would have been able to make out of the job, if the dispatch had been duly delivered to him, less what he actually did make during the time. This is illustrated by a case where a telegram was sent to a physician summoning him, but, through the negligence of the company, it was not delivered

¹ *Elliott v. Western Union Tel. Co.*, 75 Tex. 18; s. c., 12 S. W. Rep. 954. See *ante*, § 311.

² *Western Union Tel. Co. v. Smith*, 76 Tex. 253; s. c., 13 S. W. Rep. 169.

³ *Chapman v. Western Union Tel. Co.* (Ky.), 13 S. W. Rep. 880; s. c., 30 Am. & Eng. Corp. Cas. 626.

to him until it was too late to make the visit, and until after the order had been countermanded. There was testimony that a reasonable compensation for the services expected to be performed by the physician would have been \$500, and that the sender of the message was solvent. It was held, that the difference between such sum and what the physician earned during the time that he would have been absent on such visit, was the measure of damages.¹

§ 326. **Losing a Chance of Obtaining Employment.**—The rule is the same where, through the negligence of the telegraph company in not delivering a dispatch, the plaintiff fails to obtain a salaried position which is tendered to him: the measure of his damages is the difference between the amount of such salary and the amount actually earned by him, during the period of the tendered employment.² But where, in consequence of such a failure, the plaintiff lost the chance to work by the day for a period of time not stipulated, it was held, that the company was liable in nominal damages only.³ But, with due respect to this court, it should seem that the plaintiff was entitled to recover at least what he would have obtained for one day's work. Beyond that, it might well be held, in conformity with principles already discussed, that everything was speculative or contingent.

§ 327. **Plaintiff Failing to Obtain Employment—Rule Under Indiana Statute.**—A statute of Indiana contained this provision: "Telegraph companies shall be liable for *special damages* occasioned by

¹ *Western Union Tel. Co. v. Longwill* (N. M.), 21 Pac. Rep. 339.

² *Western Union Tel. Co. v. Valentine*, 18 Ill. App. 57.

³ *Merrill v. Western Union Tel. Co.*, 78 Me. 97.

failure or negligence of their operators or servants in receiving, copying, transmitting, or *delivering* dispatches, or for the disclosure of the contents of any private dispatch to any person other than to whom it was addressed, or his agent."¹ Under this statute, an action was brought against a telegraph company to recover the damages which the plaintiff had sustained by the failure of the company to deliver, within a reasonable time, a telegram directed from a place without the State of Indiana, to the plaintiff at a place within that State; by reason of which negligence the plaintiff had failed to obtain employment as a steamboat pilot at certain wages per month, for a trip, and, if he suited, for the season. He did not, in fact, obtain employment for some time thereafter, and the sender of the message was not acting as his agent in sending it. It was held that, *under the statute*, the plaintiff was entitled to recover, although no contract relation existed between him and the telegraph company, and also that the damages sought by the action were not remote or speculative. The court said, among other things: "This section is clearly broad enough to authorize a person, to whom a dispatch is sent, to recover, in a proper case, though the relation of contractors does not exist between him and the company. With regard to the damages, they are neither remote nor speculative. We gather from the evidence that the plaintiff would have realized from the employment at least \$150 per month, and it is clear that, but for the alleged negligence of defendant in failing to deliver the dispatch in a reasonable time, he would have obtained the em-

¹ 1 Gav. & Hord Ind. St., p. 611, § 2; Rev. St. Ind. 1888, § 4177.

ployment. His failure to receive the employment was the direct result of the delay in delivering the dispatch." The court, therefore, affirmed a judgment for \$210.¹ In a later action under the same statute,² against a telegraph company for failing to deliver a message, the plaintiff alleged and gave evidence tending to show that he was thrown out of an employment in which he could have made two dollars per day. An instruction that plaintiff's damages would be two dollars per day from the date of sending the message to the institution of the suit, deducting for Sundays, and such amount as he had earned or might have earned by reasonable diligence in seeking other work—was held sufficiently favorable to the defendant.³

§ 328. **The Same Subject—Nebraska Statute.**—Under the statute of Nebraska,⁴ making a telegraph company liable for all damages arising from its failure to transmit correctly messages intrusted to it, notwithstanding any condition in its printed blanks exempting it from such liability, such company is liable for the damages sustained by a person who lost a promised situation by reason of the incorrect transmission of a message to a point without the State, though the blank used by plaintiff contained a condition limiting the company's liability for failure to deliver an unrepeatd message correctly to the amount received for the same.⁵

¹ *Western Union Tel. Co. v. Fenton*, 52 Ind. 1.

² *Rev. St. Ind.* 1888, § 4177.

³ *Western Union Tel. Co. v. McKibben*, 114 Ind. 511; s. c., 14 N. E. Rep. 894.

⁴ *Comp. St. Neb.* ch. 89a, § 12.

⁵ *Kemp v. Western Union Tel. Co.* (Neb.), 44 N. W. Rep. 1064.

§ 329. **Loss of Opportunity to Save Debt by Attachment.**—In a case in California, the plaintiff's agent telegraphed to him, informing him of the failure of a firm which was indebted to him, and inquiring the amount of the debt. The plaintiff delivered to the telegraph company a telegram in reply, stating the amount of the debt, and directing the agent as follows: "Due, \$1,800. Attach, if you can find property. Will send note by to-morrow's stage." The company, through gross negligence, failed to send this reply, and other creditors seized the whole property of the failing debtors. It was held that the plaintiff would be entitled to recover the amount of his debt from the telegraph company, if he lost it in consequence of the company's neglect.¹ It has been pointed out, that here the dispatch which the company failed to deliver contained information of the *amount of the plaintiff's debt*, and was in terms sufficient to apprise the company of what he might lose by their failure to deliver the message promptly, which would be sufficient to bring the case within the rule of *Hadley v. Baxendale*, as already stated.² In a case in the court of common pleas of the city of New York, a court which, though not of final jurisdiction, has been regarded as of high authority, the plaintiffs sent for transmission a message to the defendant's office in New York addressed to an attorney in Providence, Rhode Island, directing him to attach a house and lot in that city of one B., who was then temporarily absent from Rhode Island, for a debt of \$12,000, due by B.'s firm to the plaintiffs. The

¹ *Parks v. Alta California Tel. Co.*, 13 Cal. 422; s. c., 73 Am. Dec. 589.

² *Ante*, § 311.

message was brought to the defendant's office at half past eight P. M. The office was then closed for the ordinary transaction of business. But their agent was told that the message was important; that unless it was sent and delivered at once it would be of no use; that the object of it was to get an attachment upon property in Providence; that unless it was made before the Stonington train reached the Rhode Island State line, it would do no good; and that the agent would, consequently, see the importance of the matter and why the senders were so urgent. The clerk of the telegraph company answered the plaintiff's messenger that the message would be sent and delivered as the plaintiffs desired, and that he would not take the money if he thought there was any doubt about it. The message was sent at ten minutes past nine, with directions from the operator in New York to send it in haste. It was received by the operator in Providence at half nine P. M. This operator was at the time engaged in receiving reports for the press, which, by statute, had precedence over all other matter. He answered the New York operator that it could not be sent that night, as the delivery boy had gone home. The New York operator replied that it must be sent that night, and the Providence operator responded by a sign expressing his concurrence. The Providence operator was engaged, without cessation, in receiving newspaper reports until half past 11 P. M., when he had the message copied and sent to the attorney. When the attorney received it, it was too late to have the attachment made, before the arrival of B., who returned to Rhode Island in the Stonington train that morning. The plaintiffs, by reason of this

delay, lost the advantage of securing their debt by an attachment upon B.'s house and lot, which was worth over \$12,000. The firm of which B. was a member afterward went into bankruptcy, and all that the plaintiffs recovered upon their debt from the bankrupt estate was \$5,000. On this state of facts, it was held that the plaintiffs were not bound to exhaust their legal remedy against their debtors, by the recovery of a judgment and the issuing of an execution, before bringing an action against the telegraph company for the recovery of damages. It was further held that the measure of damages was the amount of the debt and interest from the day of the delivery of the message, less the \$5,000 which the plaintiff had received from the bankrupt estate.¹

§ 330. **Operator Fraudulently Withholding Message Announcing Failure of Bank.**—A banker having made an assignment, his assignee telegraphed the fact to the cashier of a branch house. The message was received by the telegraph company's operator at 9:15 P. M., and was withheld by him until about 9:30 the following morning. The bank opened at 9 A. M., and before the delivery of the message the operator drew out money owned by himself and his company, and other sums were also paid out to unpreferred creditors. The usual time for delivering dispatches, when too late the night before, was from 8:30 to 9 A. M. It was held that the company was liable for the money paid out before the message was delivered, but not for the money afterwards paid.²

¹ *Bryant v. American Tel. Co.*, 1 Daly (N. Y.), 575. A like rule of damages was declared and applied on similar facts in *Western Union Tel. Co. v. Sheffield*, 71 Tex. 570; s. c., 10 Am. St. Rep. 790; 10 S. W. Rep. 752.

² *Stiles v. Western Union Tel. Co. (Ariz.)*, 15 Pac. Rep. 712.

§ 331. **Right to Recover the Cost of Sending Message.**—A late decision of the Supreme Court of North Carolina places the right of the sender of the message to recover even the cost of sending it, where it is not delivered, upon affirmative proof by him of negligence on the part of the company,—ignoring, as some of the decisions do,¹ the view that the failure to deliver the message is, of itself, *prima facie* proof of negligence. That court has, accordingly, held that an instruction, in such an action, that the plaintiff is entitled to recover in any event the cost of sending the message, is erroneous, and that the error is not cured by the giving of another instruction that the plaintiff cannot recover if the defendant exercised due diligence.² The court seem to be entirely oblivious to the nature of the undertaking of a telegraph company. It is not, like the undertaking of a surgeon or lawyer, an undertaking to use reasonable skill, but it is an undertaking to produce a certain *result*—as much so as is the undertaking of a common carrier; and if the company has failed in its undertaking, for any cause not attributable to the plaintiff, it is obvious that he can recover the money that he has paid them, and for which they have given him nothing in return.

¹ *Ante*, § 273, *et seq.*

² *Thompson v. Western Union Tel. Co.*, 106 N. C. 549; s. c., 11 S. E. Rep. 269; 30 Am. & Eng. Corp. Cas. 634.

ARTICLE III.—LOSS OF PROFITS.

SECTION.

- 335. Mistake in Transmitting Message Ordering Sales or Making or Directing Purchases.
- 336. Mistakes in Dispatches Ordering Goods..
- 337. Ordering Broker to Buy or Sell.
- 338. Mistake Resulting in Goods being Sent to the Wrong Place.
- 339. Other Instances of Loss of Profits where Dispatch Ordered Affirmative Action.
- 340. Damages Arising from Mistakes in Quoting Prices.
- 341. Cases in Illustration.
- 342. Dispatch Quoting Prices Sent by a Volunteer.
- 343. Damages from Delay of Message Accepting Offer of Sale.
- 344. Illustration: Loss of Weight of Cattle.
- 345. View that Rule is Inapplicable where Object is Speculation.
- 346. Loss of Certain Profits Recoverable: Loss of Contingent Profits Not.
- 347. Application of this Principle.
- 348. Illustrations of It.
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- 350. Further Illustrations.
- 351. A Modified Holding.
- 352. Loss of Profits on Intended but not Completed Contracts.
- 353. No Damages under Illegal Contracts: Option Deals.

§ 335. **Mistake in Transmitting Message Ordering Sales or Making or Directing Purchases.**—In illustration of the first of the foregoing propositions, it may be stated generally, that, where a sale or a purchase is ordered by telegraph, and the dispatch is not correctly delivered, or is not delivered at all, or within a reasonable time, there is much judicial authority for the general proposition that the

measure of damages is the *loss of profits* which the sender, or the person to whom it is addressed, in case it is sent for his benefit, sustained by reason of the negligence of the telegraph company.¹ It has been held that a person who has purchased property by telegram, and has advanced money towards its purchase, and needs the property in his business, on discovering a mistake in the price named in the telegram, is justified in receiving the property and relying upon his own judgment to make the loss as small as possible, and can maintain an action against the telegraph company for the damages actually sustained.²

§ 336. **Mistakes in Dispatches Ordering Goods.**—So, where a telegraph company received a message, ordering from a florist “two hand-bouquets,” and the agent of the company, erroneously supposing the word “hand” to be “hund,” and to mean “hundred,” delivered it thus altered, and the two hundred bouquets were accordingly prepared,—it was held, in an action against the telegraph company by the florist, that he was entitled to recover the loss sustained and the expense incurred in cutting and procuring the large number of flowers required for the bouquets.³ So, where a dispatch was delivered, in Michigan, to a telegraph company, ordering “one shawl,” and by a mistake of the company the message received by the person in New York, to whom it was directed, read “one hundred shawls,” and, in compliance with the message as received,

¹ *Manville v. Western Union Tel. Co.*, 37 Iowa, 214; s. c., 18 Am. Rep. 8. See the following sections.

² *Western Union Tel. Co. v. Du Bois*, 128 Ill. 248; s. c., 21 N. E. Rep. 4.

³ *New York, etc. Tel. Co. v. Dryburg*, 35 Pa. St. 298 (affirming s. c., *sub. nom.* *Dryburg v. Telegraph Co.*, 3 Phila. (Pa.) 408).

the plaintiffs sent one hundred shawls to the sender of the message in Michigan, where they arrived, but were reshipped to the consignor in New York;—it was held, in an action against the company, that the measure of damages was the *freight* from New York to Michigan and back, and the *depreciation* in the value of the shawls, they having reached New York after the shawl season had closed.¹ In another case, the plaintiff's agent in Chicago telegraphed its agent in Oswego for 5,000 *sacks* of salt. By the carelessness of the operator, the telegram was made to read 5,000 *casks*. In pursuance of the telegram as received, 5,000 casks were shipped, for which there was no market in Chicago, and which were sold at a loss. In an action against the telegraph company for damages arising from the mistake, it was held that the measure of damages was the difference between the market value of the salt at Oswego and at Chicago, together with the cost of transportation from Oswego to Chicago.²

§ 337. **Ordering Broker to Buy or Sell.**—A telegram, as delivered by the plaintiff to the telegraph company, read: "If we have any Old Southern on hand, sell same before board. Buy five Hudson at board. Quote price." The message, as *transmitted*, read: "If we have any Old Southern on hand, sell same before board. Buy five hundred at board," etc. Plaintiff's agent, who received the message, bought five hundred Old Southern; but plaintiff, hearing of this, immediately directed the sale thereof, and the purchase of five hundred shares of the Hudson River Railroad, according to

¹ Bowen v. Lake Erie Tel. Co., 1 Am. L. Reg. 685.

² Leonard v. New York, etc. Tel. Co., 41 N. Y. 544; s. c., 1 Am. Rep. 446, Grover, J., dissenting.

the intention of the original message as delivered. In the meantime Hudson River shares had risen, making a difference to plaintiff of \$1,375. In an action against the company for damages, it was held that the plaintiff could recover, and that the measure of damages was the rise in the price of the stock.¹ A telegraph company received the following message for transmission: "Cover two hundred September and one hundred August." It delivered the message to the person addressed as follows: "Cover two hundred September and two hundred August." The expressions were common and well understood in the cotton trade. It was held that the company was *liable to the sender* for the full amount of the damages suffered by the mistake, although the message was not repeated, according to its regulation, and notwithstanding its effort, by stipulations on the message blank, to limit its liability.² So, in an action against a telegraph company for damages sustained by plaintiffs by the alteration of a message sent on its line, whereby an order to the plaintiff's factors in Mobile to buy *five hundred* bales of cotton, was altered to *twenty-five hundred*, and the factors bought twenty hundred and seventy-eight bales before the mistake in the message was discovered,—it was held that if the company was liable at all, the measure of damages would be what was lost on the sale at Mobile, of the excess above that ordered, or if not sold there, what would have been the loss on the sale of the cotton at Mobile in the condition and circumstances in

¹ *Rittenhouse v. Independent Line of Telegraphs*, 44 N. Y. 263; s. c., 4 Am. Rep. 673; affirming s. c., 1 Daly (N. Y.), 474.

² *Western Union Tel. Co. v. Blanchard*, 68 Ga. 299; s. c., 45 Am. Rep. 480.

which it was when the mistake was discovered, including in such loss all the proper costs and charges thereon, and commissions of the factors.¹ In another case the plaintiff's agent delivered to a telegraph company at Lancaster, Pa., the following telegram, addressed to certain brokers in New York: "Buy 50 Northwestern, 50 Prairie du Chien, limit 45." The company, through negligence, sent it only a part of the way. Before the neglect was ascertained and another order sent, the stocks had risen in value. It was held that the plaintiff was entitled to recover the increased cost of the shares, to which he had been subjected by the company's negligence. The court, recognizing the rule of *Hadley v. Baxendale*, already stated,² said: "The dispatch was such as to disclose the nature of the business to which it related, and the loss might be very likely to occur if there was a want of promptitude in transmitting it."³

§ 338. **Mistake Resulting in Goods being Sent to the Wrong Place.**—Where goods ordered by telegraph are *sent to the wrong place*, in consequence of an error in repeating the dispatch, the measure of damages is not the full value of the goods at the place to which they should have been sent, but there must be a deduction for their value at the place to which they were actually sent.⁴

§ 339. **Other Instances of Loss of Profits where Dispatch Ordered Affirmative Action.**—In a leading

¹ *Washington, etc. Tel. Co. v. Hobson*, 15 Gratt. (Va.) 122.

² *Ante*, § 311.

³ *United States Tel. Co. v. Wenger*, 55 Pa. St. 262; s. c., 33 Am. Dec. 751. The court distinguish *Landberger v. Magnetic Tel. Co.*, 32 Barb. (N. Y.) 550.

⁴ *Western Union Tel. Co. v. Reid*, 83 Ga. 401; s. c., 10 S. E. Rep. 919.

case in Maine the plaintiff, having received an offer of a cargo of corn at 90 cents a bushel, delivered to the defendant, a telegraph company, for transmission, a message in reply to the offer written on a night message blank in the following words: "Ship cargo named at 90, if you can secure freight at 10. Wire us the result." The message was *not delivered*; by reason whereof the plaintiff failed to obtain the corn at the terms offered, and, the price of corn and freight having advanced, the plaintiff was compelled to purchase at higher terms. It was held that, assuming that the corn would have been forwarded at the terms named but for the non-delivery of the message, the measure of damages was the difference between the price stated and that which the plaintiff would have been obliged to pay at the same place, in order, by due diligence, after notice of the failure of the telegram, to purchase the like quantity and quality of corn, together with the additional freight.¹ In another case, the plaintiff was directed by his correspondent as follows: "Ship your hogs at once." The dispatch containing the direction was *delayed* by the negligence of the telegraph company for four days. It was held that the measure of damages was the difference, at the place of delivery of the hogs, between the market value of the hogs on the day when they would have been delivered, had the message been promptly delivered, and their market value on the day when the plaintiff was able to deliver them after the actual receipt of the message.²

¹ True v. International Tel. Co., 60 Me. 9; s. c., 11 Am. Rep. 156 (Appleton, C. J., dissenting).

² Manville v. Western Union Tel. Co., 37 Iowa, 214; s. c., 18 Am. Rep. 8. See also Mowry v. Western Union Tel. Co., 51 Hun (N. Y.),

§ 340. **Damages Arising from Mistakes in Quoting Prices.**—Where, in an apparent answer to a telegram, a letter, or other inquiry, a person delivers to a telegraph company for transmission, a message quoting the market price of a certain commodity, the company may fairly and reasonably conclude that the message may induce the addressee to order a purchase of the commodity, if the price is deemed favorable. The serious damage which may flow to the person addressed from a failure to transmit the message with entire accuracy is therefore an obvious suggestion. If the price is quoted too low, and the addressee intends purchasing *in* that market, or if the price is quoted too high, and the addressee intends purchasing *for* that market, it will in either case, probably, induce a purchase which will inure to his loss. If such a mistake is made and the loss follows, the company must make it good. This is especially true where the company itself undertakes to collect and transmit to the customer information as to the state of a definite market. When, therefore, the plaintiff had a contract with a telegraph company, by which it was to furnish him with daily market reports of the price of grain in Chicago and New York, and on a certain day it delivered to him an incorrect report of the market, by which he was induced to purchase, through his agent in Chicago, a quantity of grain to fill a contract for future delivery, it was held that the measure of damages was the difference between the actual purchase-price,

126; s. c., 4 N. Y. Supp. 666; *Western Union Tel. Co. v. Way*, 83 Ala. 542; s. c., 4 South. Rep. 844. If profits would accrue on one part of the contract, and losses on another part, the plaintiff can only recover the difference. *Ibid.*

which was considerably greater than the reported price, and the price as represented in the report.¹

§ 341. **Cases in Illustration.**—In another case, it appeared that, in response to a letter of inquiry, a merchant telegraphed to his correspondent that he would give "twenty-three cents for good young turkeys." The message, as delivered, read "thirty-three," and, at the request of the addressee, the operator telegraphed back to inquire whether thirty-three was meant, and received the answer, "Yes." Thereupon, the addressee purchased a number of turkeys at twenty-five cents a pound and shipped them to the merchant sending the message. It was held that the persons thus shipping the turkeys were entitled to recover of the company the difference between the amount paid for them and the cost of transportation, and the amount received for them, which was twenty cents a pound, but that they could not recover for the loss of prospective profits.² In another case, a correspondent of the plaintiff delivered a message to the defendant telegraph company, informing the plaintiff that he would sell him apples at \$1.75 per barrel, but by a mistake of the defendant's servants the message, as delivered, read \$1.55. On the faith of the message the plaintiff sent an order to the correspondent for a quantity of apples. He did not discover the mistake until he had paid a part of the price. The goods were perishable, and he could not get possession of them without paying the balance of the price at the rate

¹ *Turner v. Hawkeye Tel. Co.*, 41 Iowa, 458; s. c., 20 Am. Rep. 605. See also *Leonard v. New York, etc. Tel. Co.*, 41 N. Y. 544; *Smithson v. United States Tel. Co.*, 29 Md. 162, and cases in next section.

² *Western Union Tel. Co. v. Richman*, 8 Atl. Rep. 171; s. c., 6 Cent. Rep. 565.

actually quoted, that is, \$1.75 per barrel. It was held that, under the circumstance, he was justified in paying the extra twenty cents per barrel, and that he could recover it from the defendant.¹ In another case, owing to a mistake in the transmission, the price of a commodity was quoted as less than the true price, whereupon, it was ordered by and shipped to the party inquiring. Thereafter the *seller*, upon discovering the mistake, accepted the price quoted in the telegram, and sued the company for the difference between that and the true price. It was held that the seller was, in the absence of evidence of the market price at either the place of sending, or the place of receiving the goods, or of the freight rates between these points, entitled to recover such difference from the company.² In another case, the plaintiff's agent deposited a message at defendant's telegraph office for transmission to the plaintiff, to the effect that he had bought two car-loads of sheep at \$5.60 per hundred. In the course of transmission, the word "sixty" in the message had been changed to "six." Plaintiffs sold the sheep before arrival at six dollars per hundred. The court held that the measure of damages was the difference between the amount the sheep were sold for and their actual value.³ In another case, a telegraph company neglected to deliver a message to a live-stock shipper as to the state of the market at a certain point, in consequence of which neglect

¹ *Western Union Tel. Co. v. Du Bois*, 128 Ill. 248; s. c., 21 N. E. Rep. 4.

² *Pepper v. Western Union Tel. Co.*, 87 Tenn. 554; s. c., 40 Alb L. J. 45; 22 Ohio L. J. 115; 4 L. R. A. 660; 11 S. W. Rep. 783.

³ *Western Union Tel. Co. v. Landis* (Pa.), 12 Atl. Rep. 467; s. c., 21 Am. & Eng. Corp. Cas. 206. See also, *Western Union Tel. Co. v. Harris*, 17 Ill. App. 347.

the shipper sent his stock to the next nearest market, at which he received ten cents per hundred less than the market price for the same stock at the first point on the same day. It was held that the shipper was entitled to recover from the telegraph company the difference between the market prices of the two points, with the difference in freight added.¹

§ 342. **Dispatch Quoting Prices sent by a Volunteer.**—In the view of one court, no damages are recoverable for negligence in transmitting a message announcing a rise in the price of goods, whereby plaintiff sold his goods for less than he could have obtained had he received the telegram promptly, where the sender was under no legal obligation to inform the plaintiff as to the price of the goods, and his doing so was a mere volunteer act, and the message did not relate to the particular goods which they had on hand.²

§ 343. **Damages from Delay of Message Accepting Offer of Sale.**—The measure of damages for delay in delivering a message, accepting an offer to sell *goods* at a certain price, in consequence of which the *bargain is lost*, is the additional sum which the plaintiff, the sender of the message, would have been compelled to pay at the same place in order to obtain the same quality of similar goods.³ A similar rule

¹ *Western Union Tel. Co. v. Collins* (Kan.), 25 Pac. Rep. 187.

² *Frazier v. Western Union Tel. Co.*, 84 Ala. 487; s. c., 4 South. Rep. 831.

³ *Squire v. Western Union Tel. Co.*, 98 Mass. 232; s. c., 93 Am. Dec. 157. This case is cited and approved as to the rule of damages in *True v. International Tel. Co.*, 60 Me. 9, 26; s. c., 11 Am. Rep. 156, and also in *Leonard v. New York, etc. Tel. Co.*, 41 N. Y. 544, 568; s. c., 1 Am. Rep. 446. It is commented upon approvingly, and distinguished as to the question of damages, in *Beaupre v. Pacific, etc. Tel. Co.*, 21 Minn. 158; in *Graham v. Western Union Tel. Co.*, 10 Am. L. Reg. (N. S.) 329; in *Baldwin v. United States Tel. Co.*, 45 N. Y. 744, 750, and

applies where the telegram accepts an offer for the sale of *land*. Here, assuming that the company has notice of the importance of the message, under the rule elsewhere considered,¹ the measure of damages is the difference between the price at which the property was offered, and its actual market value at the time when the telegram accepting the offer should have been delivered.² It is perhaps merely another way of stating this rule, to say that the measure of damages for a breach of contract by a telegraph company to transmit a message which, if duly delivered, would have completed a contract for the sale of goods, is the profits which plaintiff would have acquired had the contract of sale been perfected.³

§ 344. **Illustration: Loss of Weight of Cattle.**—Where a *sale* has been made of *cattle* for *future delivery*, at the *option* of the purchaser, the purchaser sent a dispatch notifying the seller that he would take the stock in the morning of the next day, in accordance with a *custom* among stock-dealers to take and weigh cattle at early daylight. Owing to the failure of the telegraph company promptly to deliver the dispatch, the weighing of the cattle was delayed, and their weight decreased, it was held

in *Kiley v. Western Union Tel. Co.*, 39 Hun (N. Y.), 158, 163. There are Canadian holdings to the effect that, *if no contract would be completed* by the telegram, which the plaintiff could enforce, he cannot recover substantial damages for the negligence of the company in the transmission of his message. *Kinghorne v. Montreal Tel. Co.*, 18 Up. Can. (Q. B.) 60; *Beaupre v. Pacific Tel. Co.*, 21 Minn. 155. But see *Western Union Tel. Co. v. Hopkins*, 49 Ind. 227. But cases cited in this and the preceding sections show that this cannot be affirmed as an universal principle.

¹ *Ante*, § 313, *et seq.*

² *Alexander v. Western Union Tel. Co.*, 67 Miss. 386; s. c., 3 L. R. A. 71; 5 South. Rep. 397,—*semble*.

³ *Western Union Tel. Co. v. Way*, 83 Ala. 542; s. c., 4 South. Rep. 844.

that the company was liable to the seller for such *loss of weight*.¹

§ 345. **View that Rule is Inapplicable where Object is Speculation.**—But this rule has been held not to apply where the object of the sender of the message was simply *to purchase and then resell* on a rising market,—in other words, where a mere speculation, and not an ordinary mercantile transaction, was intended. The following case was ruled by this principle: A telegraph company delayed in transmitting a message directing the purchase of oil in open market. When the message was received oil had gone up, so that no purchase was made. *If* the message had been received promptly, and *if* the oil had been bought at once, and *if* it had been sold on the rising market, there would have been a profit; but on the trial of the action against the telegraph company, it did not appear that the oil would have been resold at that time if it had been bought. In other words, the evidence did not develop the third *if* into a reasonable certainty. The court accordingly held that no more than nominal damages could be recovered.² It may be difficult to distinguish this case on principle from the cases previously cited in this paragraph, or from the case where a merchant who deals in a certain commodity, orders it when the market is low, and, in consequence of the failure of the company seasonably to deliver his message, he is obliged to buy it after the market has advanced. Whether any difference in law or in sense can be

¹ *Hadley v. Western Union Tel. Co.*, 115 Ind. 191; s. c., 21 Am. & Eng. Corp. Cas. 72; 15 N. E. Rep. 845; 13 West. Rep. 405.

² *Western Union Tel. Co. v. Hall*, 124 U. S. 444; s. c., 8 S. E. Rep. 577.

drawn between what is called "speculating" and what is called "merchandising," where in the former case, an actual purchase and resale are intended, and not a mere fictitious purchase—a betting on the state of the market,—may be doubted. In both cases first supposed, the purchaser buys for the purpose of reselling at a profit, as any man may lawfully do.

§ 346. **Loss of Certain Profits Recoverable: Loss of Uncertain and Contingent Profits Not.**—If we are right in the three propositions already advanced, we may conclude that evidence that, in actions against telegraph companies for mistakes or delays in transmitting and delivering messages, the loss of profits on intended transactions, which might or might not have been realized according to contingencies, are not recoverable. It would be profitless to enlarge upon the reasons which have been advanced by judges and law writers for this rule. It is simply a branch of the rule that the law does not regard remote and problematical consequences of wrongs or breaches of contract, nor award damages for such consequences, the well known maxim being *causa proxima, non remota spectatur*. The author, in his work on Negligence, endeavored to analyze the cases in which this subject is considered, to look beyond the mere legal jargon in which the subject is obscured, and to discover and formulate a practical rule; and the conclusion arrived at, roughly stated, was that *proximate cause* means *probable cause*: which means that where one assumes an obligation—speaking both of cases *ex contractu* and *ex delicto*—the law makes him answerable in damages for those consequences which,

to a reasonable man in his situation and with the knowledge which he possessed, would, in conformity with the teachings of experience, be regarded as *likely* to flow from his failure to perform the contractual obligation assumed, or from the wrongful act of omission.¹ And here the law proceeds in strict accordance with sound morals; for it is morally right that the tort-feasor or the contract-breaker should be answerable in damages for those consequences of his act or default which a reasonable man in his situation, and possessing his means of knowledge, ought to foresee; and, on the other hand, it is morally wrong to hold such a person responsible for those consequences which a reasonable man in his situation, and possessing his means of knowledge, would not have foreseen—since it would be too severe to visit men with responsibility for remote and improbable consequences of their conduct; the race of life, hazardous at best, would be run surrounded with hazards greater than frail human nature could bear. It would be a continual gauntlet. No boundaries could be set to the liability which might attach from mere mistakes and inadvertent acts. The law would have no line by which to trace such a boundary, and no scales by which to weigh damages. Litigation would be endless, and society would be forever set by the ears.

§ 347. **Application of this Principle.**—Applying the foregoing principles, it may be stated with confidence that the damages recoverable for the *breach of contract* include profits which the plaintiff *certainly* would have realized; but for the defendant's default,

¹ 2 Thomp. Neg. 1084.

but do not include *speculative* or *contingent* profits.¹ The word "certainly," as here used, is not intended to be understood in an absolute sense, but rather as denoting a high degree of *moral probability*; and, in the view of many decisions, it might be more accurate to substitute the word "probably" for the word "certainly." But, on the other hand, it is a sound implication from the rule, as applied to the subject which we are considering, that where the dispatch merely *conveys information* to the plaintiff, and is not delivered to him, damages are not recoverable by him on *evidence* of what he *would have done*, as a reasonable man, in order to protect himself from certain *changes in the market*, in case he had received the information.² On the other hand, it is too plain for discussion that no damages can be recovered in such an action based upon the loss of such problematical gains as the prizes which the plaintiff's horse would win at a *trotting race*.³

§ 348. *Illustrations of It.*—A person telegraphed his agents: "Ship oil soon as possible, at very best rates you can." It seems that the message was transmitted over the wire to the office to which it was directed, but, by reason of the negligence of an employee of the company, it was not delivered. The agents did not ship the oil at the time they would have done if the message had been delivered, and the plaintiff alleged that, by reason thereof, he was compelled to pay higher rates of freight on the oil, and also that he lost great profits by the delay thus

¹ *Griffin v. Colver*, 16 N. Y. 489; s. c., 16 Am. Dec. 718. See the learned note on loss of profits as damages, 16 Am. Dec. 725.

² *Smith v. Western Union Tel. Co.*, 83 Ky. 104; s. c., 4 Am. St. Rep. 126.

³ *Western Union Tel. Co. v. Crall*, 39 Kan. 580; s. c., 18 Pac. Rep. 719.

caused in not shipping the oil. The court held that the plaintiff was entitled to recover the money he paid the company for transmitting the message, also the increased price of freight he was required to pay, and all expenses incurred by reason of the failure of the defendants to fulfill the contract to deliver the message; but that he was not entitled to recover for profits he *might have made*, had the message been delivered and the oil sent, because the rule of damages excludes uncertain and contingent profits, such as are not the immediate and necessary result of the breach of contract, and which may not be fairly supposed to have entered into the contemplation of the parties when they made it, and are not capable of being definitely ascertained by reference to establish market rates.¹ So, where a person telegraphed, accepting an offer made him to sell him certain hogs, and, by the negligence of the agents of the telegraph company, the message was not delivered, and the owner disposed of the hogs to another buyer, it was held, in an action against the telegraph company, that the sender of the message might recover the additional sum which he would have been compelled to pay at the same place in order to purchase the same number of hogs, but that he could not recover for the loss of possible profits which he *might have made* had he obtained the hogs.² A similar case was where the plaintiff received a telegram from a firm in Baltimore, offering to sell them a cargo of corn at ninety cents per bushel. Whereupon, one of the plaintiffs, who was also a member of a firm, wrote out a telegram, which

¹ Western Union Tel. Co. v. Graham, 1 Colo. 230; s. c., 9 Am. Rep. 136.

² Squire v. Western Union Tel Co., 98 Mass. 232.

he delivered to the defendants, and paid them for transmitting it to Baltimore. It read as follows: "Ship cargo named at ninety; if you can secure freight at ten, wire us result." This message was sent, but not delivered, whereby the plaintiffs failed to obtain the corn at the terms offered, and the price of corn and freight immediately advanced. The court held that the sum which would be a compensation for the direct loss sustained by the non-delivery of the message would be the difference between the ninety cents and the sum which the plaintiff would have been compelled to pay at the same place, in order, by due and reasonable diligence, after notice of the failure of the telegram, to purchase the like quantity and quality of the same species of merchandise; and that the same rule applied to any increase of freight from the sum named, it having been shown that the corn could have been shipped by the sellers at the rate mentioned in the telegram.¹ In a Canadian case,² it appeared that the plaintiff, a ship-owner, sent a message to Chatham, inquiring if the person to whom it was addressed could load his vessel with eight thousand bushels of wheat. Through an error of the telegraph company, the message, as received, read: "Three thousand," instead of "eight thousand," and he received an affirmative reply. Whereupon he abandoned a contract for a cargo from Detroit, and sent his vessel to Chatham, where he could only obtain a load of three thousand bushels, with which he sailed. In an action against the telegraph company, it was held that the damages which naturally resulted from the defendant's breach of duty

¹ True v. International Tel. Co., 60 Me. 9.

² Lane v. Montreal Tel. Co., 7 Upper Canada C. P. 23.

were the expenses of sending the vessel to Chatham and back, and that the plaintiff was not entitled to recover the profit he *might have made* from carrying eight thousand bushels.¹

§ 349. **Further Illustrations.**—So, where a telegraph company, through negligence, failed to transmit and deliver a telegram in these words: "Get \$10,000 of the mail company," it was held that the sender could not recover as damages the *loss of commissions* upon a purchase which he *would have made* if the telegram had been delivered, or a penalty which, by the terms of the contract, he was obliged to pay in consequence of the failure to make the purchase, the reason being that the defendants were not to be held liable for damages arising from transactions, notice of which could not be derived from the terms of the dispatch itself.² A most apt illustration of the principle is found in a case where the

¹ See also *Breese v. United States Tel. Co.*, 45 Barb. 275; s. c., affirmed, 48 N. Y. 132; 8 Am. Rep. 526; *Hubbard v. Western Union Tel. Co.*, 33 Wis. 558.

² *Landsberger v. Magnetic Tel. Co.*, 32 Barb. (N. Y.) 530. In *Shields v. Washington Tel. Co.*, 9 West. L. J. 233 (*anno* 1852), which was a case *at nisi prius*, the telegram as received for transmission was in these words: "Oats 56, bran \$1.10, corn 73, hay 25." As delivered, the word sixty-six was substituted for fifty-six. No explanation of the meaning of the telegram had been made to the telegraph company. It was held that the measure of damages was simply the price paid for transmitting the telegram. But in *Bowen v. Lake Erie Tel. Co.*, 1 Am. L. Reg. 685, a telegram was addressed to the plaintiffs, who were merchants. When delivered to the telegraph company for transmission it ran as follows: "Send one handsome \$8.00 blue and orange." As delivered it read as follows: "Send one hundred \$8.00 blue and orange." The plaintiffs accordingly sent one hundred *shawls* of that description to the signer of the message, who returned them to the plaintiffs. In the meantime the season for the sale of shawls had closed and they had depreciated in value. It was held (in submitting the case to the jury), that the plaintiffs might recover for the loss. It is to be observed that, in this case, the message, on its face, conveyed to the company information of the value which was to be paid for the articles sent for.

message was sent by the plaintiff, directed to his agent, requiring the agent to buy a certain quantity of wheat to be delivered at seller's option, and the message was not delivered by the company, and the price of wheat fluctuated during the month of June, but was, at the close of the month, less than on the day when the message should have been delivered. It was held that, as the court could not presume that the plaintiff *would have sold at the right time* to make a profit, had the wheat been purchased by the agent in pursuance of the telegram, the plaintiff was, therefore, entitled to no more than nominal damages.¹

§ 350. **Further Illustrations.**—In general, it may be said that where the damage claimed is a loss of that which *might have been obtained*, depending on the contingency of a certain *expected action in a third person*, in the event of a depending contract being carried out, it is too remote to be regarded as within the contemplation of the party breaking the contract. Thus, where the dispatch was: "Can close Valkyria and Othere, twenty-two, twenty net, Montreal. Answer immediately," and the subject of the dispatch was the chartering for the person addressed of two vessels named Valkyria and Othere, it was held that the *commissions* which the sender of the dispatch would have earned as a *broker* in effecting a charter of the two vessels if the message had been duly transmitted, were not damages, either actually contemplated, or to be fairly supposed to

¹ Hubbard v. Western Union Tel. Co., 33 Wis. 558; s. c., 14 Am. Rep. 775. Compare Williams v. Reynolds, 18 Eng. Com. Law, 493; s. c., 13 Weekly Rep. 940; Shepard v. Milwaukee Gas-Light Co., 15 Wis. 318; Richardson v. Chinoweth, 26 Wis. 656; Havermyer v. Cunningham, 35 Barb. (N. Y.) 515; Hamilton v. Ganyard, 34 Barb. (N. Y.) 204, cases following and applying, in various states of fact, the rule of Hadley v. Baxendale, 9 Exch. 341.

have been contemplated by the telegraph company, and were, therefore, not recoverable.¹ So, it has been held that a declaration in an action against a telegraph company alleging that, by the negligence of the company, a message directing plaintiff to meet the sender on the arrival of a certain railroad train, prepared to render services specified, was delivered too late for him to meet the train, whereby he lost profits which he would have made from such services, is bad on demurrer, for the reason that no right to recover damages is shown, the making of such profits being *mere possibility*.²

§ 351. **A Modified Holding.**—Another court has held that if, through the negligence of a telegraph company, a message directing the purchase of 1,000 shares of specified stock for the sender, is so missent as to read 100 shares, and if, in consequence of such mistake only 100 shares are bought, and there is a rise in the market value of such stocks, both before and after the sender received notice of the mistake, the sender can recover of the company, as damages, only the difference in the cost of 900 shares of the specified stock at the time the 100 shares were purchased, and their cost at such time, after notice of the mistake, as he could, with due diligence, have secured their purchase.³

§ 352. **Loss of Profits on Intended, but not Completed Contracts.**—There is judicial authority for the proposition that where, in an action against a telegraph company for a failure to transmit a message, it is sought to recover damages for losses of profits

¹ *McColl v. Western Union Tel. Co.*, 44 N. Y. Super. 487; s. c., 7 Abb N. C. 151.

² *Clay v. Western Union Tel. Co.*, 81 Ga. 285; s. c., 6 S. E. Rep. 813.

³ *Marr v. Western Union Tel. Co.*, 85 Tenn. 529.

which, it is alleged, would have been made upon a contract which the message was designed to complete, it must appear that the delivery of such message to the party to whom it was directed would have effected a valid and binding contract. Thus, where the plaintiffs, merchants in St. Paul, wrote to a wholesale dealer in pork in Dubuque: "Have you any more northwestern pork, or prime mess; also, extra mess? Telegraph price on receipt of this;" and received in reply a telegram in these words: "Letter received. No light mess here. Extra mess, twenty-eight seventy-five;" and, thereupon, the plaintiff delivered to the defendants, a telegraph company, for transmission, the following message, which the defendants undertook to transmit and deliver to the wholesale pork-dealer in Dubuque: "Dispatch received. Will take two hundred extra mess, price named;" which dispatch, on account of the negligence of the telegraph company, was not delivered for several days afterwards, and in the meantime pork had gone up in price; it was held that the telegram from Dubuque did not purport to be an offer to sell any quantity of pork, nor was the plaintiffs' message an acceptance of any offer; that the seasonable delivery of the plaintiffs' message would not have effected any contract binding on the party in Dubuque to deliver *any definite quantity* of pork; that the plaintiffs' message was merely an order for two hundred barrels of pork at the price named, and, until its acceptance, *no contract* would exist between the parties; and that, therefore, no damages could be allowed, based upon the advance in the price of pork during the time the message

was delayed.¹ So, in a case in Canada, it appeared that the plaintiff received a telegram: "Will give you eighty cents for rye." He sent a telegram in reply. "Do accept your offer; ship to-morrow fifteen or twenty hundred." In an action brought against the telegraph company for negligence in not transmitting the latter message, it was held that no damages for the loss of a sale of rye could be recovered; because, even if the telegram had been duly transmitted and delivered, there would have been *no complete contract* binding the purchaser to take any particular quantity of rye, and that parol evidence to show that the purchaser *would have taken* a certain quantity was immaterial.² As already suggested,³ the theory of this decision, though possibly sound in its application to the facts in judgment, is not borne out by the mass of decided cases.

§ 353. **No Damages under Illegal Contracts—Option Deals.**—Contracts for fictitious or option "futures," made in Georgia, being illegal whether between principal and principal, or broker and principal, where both parties are in complicity touching the unlawful purpose, such contracts, or the loss or gain resulting from them, cannot be invoked to measure the damages sustained by the sender of a telegram in consequence of a mistake made by the telegraph company in transmitting the message.⁴

¹ *Beaupre v. Pacific, etc., Tel. Co.*, 21 Minn. 155.

² *Kinghorne v. Montreal Tel. Co.*, 18 Upper Canada, Q. B. 60.

³ *Ante*, § 335 *et seq.*

⁴ *Cothran v. Western Union Tel. Co.*, 83 Ga. 25; s. c., 9 S. E. Rep. 836; 25 Am. & Eng. Corp. Cas. 533 (overruling *Telegraph Co. v. Blanchard*, 68 Ga. 299).

ARTICLE IV.—CIPHER AND UNINTELLIGIBLE DISPATCHES.

SECTION.

357. Application of the Rule in *Hadley v. Baxendale* to Unintelligible Dispatches.
358. In Case of Cipher or Unintelligible Messages, Nominal Damages Only.
359. Reasons Adduced in Support of this Rule.
360. Rule Applicable to Unintelligible Dispatches, though not in Cipher.
361. An English Case Illustrating the Rule.
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369. No Distinction Between Non-Delivery and Mistake.
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371. Stipulation as to Repeating, in its Application to Cipher Dispatches.
372. Cases which Deny that there is Any Distinction Between Cipher and Other Dispatches in Respect of the Measure of Damages.
373. Exemplary Damages for the Non-Delivery of Cipher Dispatches.
374. Unintelligible Dispatches Subject to Parol Explanation.
375. Evidence that Agent had Information of Nature of Message.

§ 357. Application of the Rule of *Hadley v. Baxendale* to Unintelligible Dispatches.—Recurring now to the rule of damages laid down in *Hadley v. Bax*

endale,¹ that the damages to be given in such cases are "such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract;" or to the interpretation put upon the rule by an American court,² "that the party is liable for all the direct damages which both parties to the contract would have contemplated as flowing from its breach, if, at the time when they entered into it, they had bestowed proper attention upon the subject, and had been fully informed as to the facts,"—it must be concluded that the *knowledge* which the sender of the dispatch and the agent of the telegraph company who received it had at the time when it was received for transmission, is a most important element in estimating the damages to be given in the case of a failure to transmit it properly and seasonably. As the sender of the message may be supposed to possess such knowledge on the subject, the question generally takes the form of considering what was the knowledge or means of knowledge of the telegraph company.

§ 358. **In Case of Cipher or Unintelligible Messages, Nominal Damages Only.**—The weight of authority, and especially the decisions in England and the commercial States of the Union, are to the effect that, where a dispatch is delivered to a telegraph company *in cipher*, or where it is couched in such language as does not disclose its import to the agent of the company who receives it for transmission, and he is not otherwise advised of its import, or advised of any special circumstances

¹ *Ante*, § 311.

² *Ante*, § 312.

which will entail loss in case it is not correctly and seasonably delivered, the company will be liable in case of default in transmitting it correctly, or in case of negligent delay in its delivery, or in case of an entire failure to deliver it,—to pay *nominal damages only*, or, at most, the sum paid by the sender for transmitting it.¹

§ 359. **Reasons Adduced in Support of this Rule.**—

If we were to expand upon the reasons which have been given by the judges for this rule, we should not find any more satisfactory ones than those given in some of the cases from which we have already quoted. It is difficult to see how any one can examine impartially the judicial opinions in which those reasons have been unfolded, without coming to the conclusion that the judges have done most of their thinking on the side of the telegraph companies, and very little on the side of their cus-

¹ *Sanders v. Stuart*, 1 C. P. Div. 326; s. c., *sub nom. Saunders v. Stewart*, 35 L. T. (N. S.) 370; *Moak Eng. Rep.* 286; *Western Union Tel. Co. v. Martin*, 9 Bradw. (Ill.) 587; *Beaupre v. Pacific, etc. Tel. Co.*, 21 Minn. 155; *Mackay v. Western Union Tel. Co.*, 16 Nev. 222; *Daniel v. Western Union Tel. Co.*, 61 Tex. 452; s. c., 48 Am. Rep. 305; *Candee v. Western Union Tel. Co.*, 34 Wis. 471; s. c., 17 Am. Rep. 452; *Cannon v. Western Union Tel. Co.*, 100 N. C. 300; s. c., 6 Am. St. Rep. 590; *Hart v. Western Union Tel. Co.*, 66 Cal. 579 (divided court); *Abeles v. Western Union Tel. Co.*, 37 Mo. App. 554; *Baldwin v. Western Union Tel. Co.*, 45 N. Y. 744 (reversing s. c., 54 Barb. (N. Y.) 505; 6 Abb. Pr. (N. S.) 405; 1 Lans. (N. Y.) 125; *Belun v. Western Union Tel. Co.*, 7 Reporter, 710; s. c., 8 Cent. L. J. 445; 11 Ch. Leg. N. 276; *Landsberger v. Magnetic Tel. Co.*, 32 Barb. (N. Y.) 530; *Kinghorne v. Montreal Tel. Co.*, 18 Up. Can. Q. B. 60; *Shields v. Washington Tel. Co.*, 9 West. L. J. 5 (*nisi prius* case); *United States Tel. Co. v. Gildersleve*, 29 Md. 232; s. c., 96 Am. Dec. 519; *Horne v. Midland R. Co.*, L. R. 7 C. P. 583 (commented on in *Wood's Mayne on Damages*, § 34); *Western Union Tel. Co. v. Kirkpatrick*, 76 Tex. 217; s. c., 13 S. W. Rep. 70; *McColl v. Western Union Tel. Co.*, 7 Abb. N. Cas. (N. Y.) 151; *Behm v. Western Union Tel. Co.*, 8 Biss. (U. S.) 181. American cases on this subject are collected in a note in 21 Am. & Eng. Corp. Cas. 131.

tomers. One court has reasoned that, in order to make a telegraph company liable for the *ulterior* or remote consequences of its failure properly to transmit a message, according to its engagement, of the importance of which it is not advised by what appears on the face of the message, *it is the duty of the sender to disclose* to the company's agent its meaning. The same court reasons that telegraph messages sent in cipher, the purport of which is entirely unknown to the officers or agents of the company, present a case falling within the principle in the law of *carriers*, which exempts the carrier from responsibility on the ground of *concealment* by the owner of the goods, of their nature, amount and value.¹

§ 360. **Rule Applicable to Unintelligible Dispatches, though not in Cipher.**—The same reason, and consequently the same rule, applies to dispatches which, though not in cipher, are so framed as to be unintelligible to the agents of the telegraph company. Accordingly, the rule in *Hadley v. Baxendale* has been applied where the dispatch read: "Sell fifty gold," and where the real meaning, as understood between the sender and the person addressed, was: "Sell fifty thousand dollars of gold." Here it was held, in an action for damages for failure to transmit and deliver the above dispatch, that the trial court erred in instructing the jury that the plaintiff was entitled to recover to the full extent of his loss by the decline in gold. The court stated and applied the rule in *Hadley v. Baxendale*, and, speaking through ALVEY, J., said: "If the measure of

¹ Reasoning of the Court in *Candee v. Western Union Tel. Co.*, 34 Wis. 471; s. c., 17 Am. Rep. 452.

responsibility at all depends upon a knowledge of the special circumstances of the case, it would certainly follow that the nature of this dispatch should have been communicated to the agent at the time it was offered to be sent, in order that the appellant might have observed the precautions necessary to guard itself against the risk.'''

§ 361. **An English Case Illustrating the Rule.**—*A collector of telegraphic messages*, who, for reward, undertook to receive messages for transmission, and to transmit them by telegraph to places abroad, received such a message written in a cipher (which he had no means of understanding or reading), and negligently transmitted it wrongly, so that the sender of the message lost a profitable contract. It was held that only nominal damages could be recovered by him in an action against such collector.¹

§ 362. **A Canadian Case Illustrating the Rule.**—In a case in the Queen's Bench of Upper Canada, the message was as follows: "Kingston, 2d September, 1857. To Mr. Crawford, Oswego: Do accept your offer; ship to-morrow fifteen or twenty hundred. G. M. Kinghorne." In denying liability for substantial damages, ROBINSON, C. J., said: "What would the message of the 2d September have informed the man, or boy whose duty it was to take it from the wire, and to send it by another man or boy to the office of the American company? Nothing but that the plaintiff had accepted an offer, he could not tell for what, and would ship fifteen or twenty hundred, whether of staves or shingles, or barrels of flour, or bushels

¹ *United States Tel. Co. v. Gildersleve*, 29 Md. 232; s. c., 96 Am. Dec. 519, 527.

² *Saunders v. Stewart*, 35 L. T. (N. S.) 370; s. c., 24 W. R. 949; 1 C. P. Div. 326; 45 L. J. (C. P. Div.) 682.

of grain, he could not tell; nor could he guess what might be the occasion for haste, or the consequences of delay or neglect. A possible loss or gain to the plaintiff, depending on the time at which the message would arrive, was a consequence which the defendants could not appreciate, and cannot be supposed to have contemplated at the time they received the message.'"¹

§ 363. **American Cases Illustrating the Rule.**—Under the operation of this rule, where the company was not apprised of special circumstances which would entail loss, damages have been denied, accruing through the loss of an opportunity to charter a vessel;² or requesting the addressee, who was the husband of the sender, to come immediately to the latter's father, who was very low,—the damages being the loss sustained by a husband through the mental suffering of his wife,—the message not disclosing who the person was who was very low.³ In another case it appeared that the defendants, a telegraph company, through negligence, failed to transmit and deliver a telegram in these words: "Get ten thousand dollars of the Mail Company." The amount of damages allowed was the sum paid the defendants for transmitting the message, and the interest on ten thousand dollars, the receipt of which by the plaintiffs was delayed five days, on account of the non-delivery of the telegram. The court sustained the decision of the referee in the case, who had rejected a claim for damages for *commissions* on pistols, to which the plaintiffs would

¹ *Kinghorne v. Montreal Tel. Co.*, 18 Up. Can. Q. B. 60.

² *McColl v. Western Union Tel. Co.*, 7 Abb. N. Cas. (N. Y.) 151.

³ *Western Union Tel. Co. v. Kirkpatrick*, 76 Tex. 217; s. c., 13 S. W. Rep. 70.

have been entitled had the contract been performed, and also the amount of a *penalty* which the plaintiffs had to pay on account of a failure to perform a contract which they would have performed if the message had been received. Basing its opinion on the general rule as to the measure of damages, the court said: "In receiving this message for transmission, the defendants had no information whatever in relation to it, or the purposes to be accomplished by it, except what could be derived from the dispatch itself. The effect of any delay in the delivery of the dispatch would naturally and necessarily be equal delay in the receipt by the plaintiffs, in New York, of the \$10,000 therein mentioned. The defendants were not informed of any special use intended to be made of this sum of money, and what damage might naturally be expected to follow from the delay in the receipt of it. Clearly, the loss of the use of that sum during the time that its receipt was delayed, and the damages for the loss of such use, are, by the laws of New York, determined to be the interest on the money for the period of the delay, at seven per cent. per annum.'"

§ 364. **Extrinsic Information of the Importance of the Message.**—In a case in the New York Court of Appeals,¹ the doctrine is held, in general terms, that if a telegram does not show upon its face that it relates to a business transaction, and that a pecuniary loss may probably be sustained if a mistake is made in transmitting it, and no notice to this effect is given to the telegraph company, the company will not be liable for such loss. And the

¹ *Landsberger v. Magnetic Tel. Co.*, 32 Barb. (N. Y.) 530.

² *Baldwin v. United States Tel. Co.*, 45 N. Y. 744 (reversing s. c., 54 Barb. 505; 6 Abb. Pr. (N. S.) (N. Y.) 405; 1 Lans. (N. Y.) 125).

opinion was also expressed that *oral information* of the true meaning and significance of a telegram, showing that it does in fact relate to a business operation, and is of a pecuniary importance, when it does not appear to be of that character upon its face, will not be sufficient to bind the company. But there is, certainly, no rule of law which lets in extrinsic information of the facts which make the message specially important, and which at the same time confines such information to a written notice, though it would no doubt be competent for the parties to stipulate that such information, to be valid, should be communicated in writing. The danger of perjury, which exists in this case, is no greater than that which attends all important oral transactions. The true rule undoubtedly is, that telegraph companies are liable to the extent of *actual* damages, within the limitations of the rules elsewhere discussed, sustained through delay in the transmission of the message, or, through the failure to transmit it, when the importance of it is *manifest* either by the words of the message, or by *explanation* made at the time it is delivered.¹ This is well illustrated by a recent case where the plaintiff, who had purchased a flock of sheep, which he wished to drive to his ranch, directed a telegram to a servant to meet him at a certain place and "bring Shep" (meaning a sheep dog on the ranch). The message was delivered so as to read, "bring sheep." The servant accordingly drove the plaintiff's sheep from the ranch to meet him. In an action for damages to the newly purchased sheep, for the additional expense of keeping them, and for loss, exposure, and injury to both

¹ *Mackay v. Western Union Tel. Co.*, 16 Nev. 222, 228. Compare *Hart v. Direct, etc. Tel. Co.*, 88 N. Y. 633.

flocks, etc., plaintiff in his petition alleged that when he sent the dispatch he informed defendant's agent in charge of its office that he wanted the dog to assist in driving the sheep to his ranch. It was held that this allegation implied that the defendant had direct notice of the object of the dispatch, so as to make the company chargeable with the actual damages.¹ In a case in New York, later than the first above cited, the clerk or operator to whom the message was handed was *told of its object*, and that it was of great importance that the party sending it should get a reply the next day. It was held that, this being the case, there was no ground for limiting the damages to the amount paid for sending the message, as that was not the only damage that could have been contemplated by the contract between the parties.²

§ 365. **Sufficient that the Company is put upon Inquiry.**—There is a principle in the law relating to notice, of constant application, that any communication is in law notice, which is sufficient to put a reasonable prudent man upon inquiry.³ This principle has been frequently invoked in cases such as we are considering, so as to result in the conclusion that, if the language of the dispatch suggests its nature and importance in a general way, the company will be liable for the actual damages accruing from its failure to transmit it seasonably and correctly,—the courts, reasoning that if the company desire fuller information as to its nature, they must

¹ *Western Union Tel. Co. v. Edsall*, 74 Tex. 329; s. c., 12 S. W. Rep. 41.

² *Sprague v. Western Union Tel. Co.*, 6 Daly (N. Y.), 200.

³ *Lodge v. Simonton*, 2 Penr. & W. (Pa.) 439; s. c., 23 Am. Dec. 36, and note 23 Am. Dec. 47.

seek it or be charged with the consequences of all knowledge which such inquiries would have elicited.¹ In a case in the Commission of Appeals of New York it was said by Mr. Commissioner Earl: "If the defendant's agents did not understand the importance or import of the message, they could have inquired of the plaintiff, and hence, for all the purposes of this action, it must be treated as fully understanding the message, and the consequences which would result from its erroneous transmission." This was said of a message, not in cipher, which ordered the sale of certain stocks, and which was, therefore, of a character to advise the agents of the telegraph company, in a general way, of its nature and importance.² And there is recent judicial authority for the conclusion that the company is chargeable with notice of the meaning and importance of the message, where, from *previous transactions*, or its *habit* of sending messages couched in similar language, it might, by reasonable diligence, have understood it.³ It would seem to be a reasonable conclusion that, if, from his *course of dealing* with the sender of the message, or from his position as the receiver of messages of like character, the company's agent *ought to have known* its meaning or its importance, although it might have been unintelligible to the general public, the company should not be heard to say that it was unintelligible, or apparently unimportant. The forms of expression used in telegraphing orders for, or commu-

¹ Western Union Tel. Co. v. Edsall, 74 Tex. 329; s. c., 12 S. W. Rep. 41.

² Rittenhouse v. Independent Line of Telegraph, 44 N. Y. 263; s. c., 4 Am. Rep. 673; (affirming s. c., 1 Daly, 474).

³ Postal Telegraph Cable Co. v. Lathrop, 131 Ill. 575; s. c., 23 N. E. Rep. 583; 7 L. R. A. 474; 30 Cent. L. J. 12.

nications regarding the market reports of stocks, grain and other commodities, are often inexplicable to persons who have no experience in transactions involving such commodities; yet to one versed in sending, receiving, or transmitting such messages, they might be perfectly intelligible. Now, if one telegraphing in relation to stocks should use the language commonly employed in telegraphing such communications, the message should be held to be equally as intelligible to the telegraph company as if it were written out in full English.

§ 366. **General Information Sufficient.**—A reasonable deduction from the rule is that *general information*, disclosed by the language of the message, of the subject to which it relates, is sufficient to charge the company with liability for actual damages; and that it is not necessary that the company should be able to foresee the exact amount of pecuniary loss which its negligence would be likely to cause.¹ When, therefore, enough appears in the message to show that it is a commercial or business transaction, it is sufficient to charge the company with the damages resulting from its negligent transmission, although the operator may not be able to understand its meaning as to quantity, quality, price, etc., as the sender and the party to whom it is sent understand it.²

§ 367. **Instances of Dispatches Sufficiently Disclosing the Nature and Importance of the Transaction.**—These suggestions naturally lead us to inquire what telegraphic messages have been held sufficient

¹ *Pepper v. Western Union Tel. Co.*, 87 Tenn. 554; s. c., 40 Alb. L. J. 45; 22 Ohio L. J. 115; 4 L. R. A. 660; 11 S. W. Rep. 733.

² *Postal Telegraph Cable Co. v. Lathrop*, 131 Ill. 575; s. c., 7 L. R. A. 474; 30 Cent. L. J. 12; 23 N. E. Rep. 583.

on their face, to disclose to the company their nature and importance. And here it may be premised, that such a message does not fall within the rule relating to cipher dispatches, from the mere fact that *abbreviations* are used in it which are commonly *used in trade*, and which are hence presumptively understood by the agents of the company.¹ The following instances may be given of dispatches which are of a nature sufficiently to disclose the business to which they relate, and the loss which might likely occur through mistakes in transmitting, non-delivery, or unreasonable delay in delivering them: "Sell one hundred Western Union, answer price;"² "Will you give one fifty for twenty-five hundred;"³ "Please buy in addition to thousand August one thousand cheapest month;"⁴ "You had better come and attend to your claim at once."⁵

¹ *Pepper v. Western Union Tel. Co.*, 87 Tenn. 554; s. c., 10 Am. St. Rep. 699; 11 S. W. Rep. 783; 40 Alb. L. J. 45; 22 Week. L. Bul. 115; 4 L. R. A. 660; 25 Am. & Eng. Corp. Cas. 542. In this case a produce dealer, in response to an inquiry for prices, telegraphed, "Car cribs six sixty c. a. f. prompt." The word "cribs" meant in the meat trade clear ribs, and "c. a. f." meant cost and freight. These terms were well understood by the trade and by the telegraph company. The dispatch as delivered by the company read "thirty" instead of "sixty." In consequence of the mistake the dealer lost \$75 on a sale. It was held, that the telegraph company must bear the loss, and that it could not contend that the dispatch was a cipher dispatch.

² *Tyler v. Western Union Tel. Co.*, 60 Ill. 434; s. c., 14 Am. Rep. 38.

³ *Western Union Tel. Co. v. Griswold*, 37 Ohio St. 301; s. c., 41 Am. Rep. 500.

⁴ *Postal Telegraph Cable Co. v. Lathrop*, 131 Ill. 575; s. c., 7 L. R. A. 474; 30 Cent. L. J. 112; 23 N. E. Rep. 583 (sufficiently explicit to charge the telegraph company for a loss resulting from an inexcusable mistake in transmitting it).

⁵ *Western Union Tel. Co. v. Sheffield*, 71 Tex. 570; s. c., 10 Am. St. Rep. 790.

§ 368. **A Further Illustration.**—In a case in Pennsylvania, the plaintiff's agent delivered to a telegraph company at Lancaster the following telegram, addressed to brokers in New York: "Buy fifty North-Western, fifty Prairie du Chien; limit forty-five." The company, through negligence, sent it only part of the way, and the stock named in the telegram rose in value before the neglect was ascertained and another order sent. It was held that the plaintiff was entitled to recover the increased cost of the shares, to which he was subjected by the company's negligence. The court said: "The dispatch was such as to disclose the nature of the business to which it related, and that the loss might be very likely to occur if there was want of promptitude in transmitting it containing the order. In this respect it differs much from that in *Landsberger v. Magnetic Telegraph Company*.¹ 'Get ten thousand dollars of the Mail Company,' the message in that case said, but did not disclose that the money was to be gotten from the Mail Company to save from failure a valuable contract; hence it was held that the damages arising from that cause could not reasonably be presumed to have been in the contemplation of the parties to the contract, or not recoverable to that extent. Here the object of the message was for the purpose of buying stock as soon as received; no other time being named; and it is not possible, consistently with any knowledge of the business of dealing in stocks, to fail to understand that damage might ensue,—nay, would be likely to ensue,—by delay. The damage from such a source was what would naturally have entered

¹ 32 Barb. (N. Y.) 530.

into the minds of the sender and the undertaker to send the message, if they thought on the subject at all.''¹

§ 369. **No Distinction Between Non-Delivery and Mistake.**—In respect of the rule in *Hadley v. Baxendale*, as applied to the liability of a telegraph company, there can be no distinction in principle between the case of a mistake in transmitting a message, whereby its language is garbled and the addressee misled, and the case of a negligent delay in delivering, or an entire non-delivery. In either case there has been, at least, a *breach of the contract* on the part of the company; and the rule of damages formulated in that celebrated case is a general rule applicable in cases of breaches of contract.² This question must not be confused with the subject already considered,³ of the power of a telegraph company, by stipulation on its message blanks, to limit its liability in case the message is not repeated. There, it is held by those courts which have taken the pains to reason upon the subject at all, that such a stipulation cannot operate to excuse a non-delivery, since repeating the message would have no tendency to prevent such an accident.⁴ The Supreme Court of the United States has, however, taken such a distinction, where the dispatch could not perhaps in strictness be designated as a cipher dispatch. It read: "Buy ten thousand, if you think it safe. Wire me." In consequence of delay

¹ *United States Tel. Co. v. Wenger*, 55 Pa. St. 262; s. c., 93 Am. Dec. 751.

² *Ante*, § 311. This rule of damages has been recognized and applied by American courts in many situations. See *Shepard v. Milwaukee Gas-Light Co.*, 15 Wis. 318; *Richardson v. Chynoweth*, 26 Wis. 656.

³ *Ante*, § 217, *et seq.*

⁴ *Ante*, § 228, *et seq.*

in delivering it, the plaintiff lost the advantage of a rise in the market of petroleum. The court, in an elaborate and learned opinion by Mr. Justice Matthews, held that the plaintiff could recover no more than the price of transmitting the message. The court take a distinction, expressed in the following language, which many other courts do not recognize: "Of course, where the negligence of the telegraph company consists, not in *delaying* the transmission of the message, but in transmitting a message *erroneously*, so as to mislead the party to whom it is addressed, and on the faith of which he acts in the purchase or sale of property, the actual loss based upon changes in market value are clearly within the rule for estimating damages."¹ Though the decision of this case was probably correct on other grounds, this distinction is believed to be unsound where, as in particular the case, the sender of the message is the plaintiff.

§ 370. **Stipulations in Message Blanks as to Cipher or Obscure Messages.**—It is said that there are blanks furnished by telegraph companies to their customers, in which the sender agrees that the company shall not be liable "for errors in cipher or obscure messages."² The writer of that observation had not been able to find any case in which the reasonableness of this stipulation had been the subject of a judicial decision; nor has the present writer been able to find such a case. The following just observation is made upon this subject by a recent writer: "The exact extent of this regulation is not clear. Extrinsic knowledge of the

¹ *Western Union Tel. Co. v. Hall*, 124 U. S. 444, 458.

² *Note to Camp v. Western Union Tel. Co.*, 71 Am. Dec. 742.

meaning of such messages is not mentioned, nor is a refusal to incorporate that knowledge into contracts to communicate such messages definitely stated. If the courts should interpret the regulation as intending to include only those cases in which a telegraph company has no other knowledge of the meaning of a message than the face discloses, a regulation of this nature would seem to be perfectly useless. If the message is meaningless, the company is liable only in nominal damages. If the message is not meaningless, the company cannot, as a rule, contract against the loss that, from the face of the message, would seem to be the natural and proximate consequence of a breach."

§ 371. **Stipulation as to Repeating, in its Application to Cipher Dispatches.**—If a condition in a message blank which exonerates the company from liability in case the dispatch is not repeated, is reasonable when applied to a dispatch the purport of which can be understood by reading it,¹ it is reasonable, for stronger reasons, in the case of a cipher dispatch, the purport of which cannot be understood by reading it; and so it has been held.²

§ 372. **Cases Which Deny that there is Any Distinction between Cipher and Other Dispatches in Respect of the Measure of Damages.**—We may conclude this chapter by referring to a limited class of American cases, which hold that a telegraph company is liable in damages for the non-delivery, or for unreasonable delay in the delivery, of a cipher dis-

¹ Gray Com. by Tel. § 92, note.

² *Lassiter v. Western Union Tel. Co.*, 89 N. C. 334; *ante*, § 217.

³ *Cannon v. Western Union Tel. Co.*, 100 N. C. 311; s. c., 6 Am. St. Rep. 590.

patch, and that the recovery in such a case is not limited to nominal damages, or to the mere sum paid for the transmission of the message, although the company did not otherwise have knowledge of the special circumstances making the message important.¹ It is said to be of no consequence whether the dispatch is in plain English or in cipher, provided the cipher is written in the English alphabet.² Where such a dispatch directs the sale of goods owned by the sender, the measure of damages is held to be the difference in the market price between the time when they *would have been* sold if the dispatch had been delivered and the time of the actual sale.³

§ 373. **Exemplary Damages for the Non-Delivery of Cipher Dispatches.**—It has been held that exemplary damages cannot be recovered for a breach of a contract to send a message written in cipher, the meaning of which is not communicated to the agent of the company to whom it is delivered, in the absence of evidence of *negligence, wanton* or

¹ *Western Union Tel. Co. v. Fatman*, 73 Ga. 285; s. c., 54 Am. Rep. 877; *Western Union Tel. Co. v. Reynolds*, 77 Va. 173; s. c., 46 Am. Rep. 715 (Lewis, P., dissenting); *Daughtery v. American Union Tel. Co.*, 75 Ala. 168; s. c., 51 Am. Rep. 435; *Western Union Tel. Co. v. Way*, 83 Ala. 542 (Somerville, J., dissenting); *Western Union Tel. Co. v. Heyer*, 22 Fla. 637; s. c., 1 Am. St. Rep. 222; 1 *South. Rep.* 129 (Raney, J., dissenting); *Rittenhouse v. Independent Line of Telegraph*, 1 *Daly* (N. Y.), 474 (*semble*); *Bowen v. Lake Erie Tel. Co.*, 1 *Am. L. Reg.* 685 (*nisi prius* case); *American Union Tel. Co. v. Daughtery*, 89 Ala. 191; s. c., *sub. nom.*; *American Union Tel. Co. v. Daughtery* (Ala.), 7 *South. Rep.* 660 (Somerville, J., dissenting); *Strasburger v. Western Union Tel. Co.*, cited *Sedgw. Dam.*, 6th ed., p. 441, note; 2 *Thomp. Neg.* p. 856. See *McColl v. Western Union Tel. Co.*, 7 *Abb. N. Cas.* (N. Y.) 151, 154. and note.

² *Western Union Tel. Co. v. Heyer*, 22 Fla. 637.

³ *Daughtery v. American Union Tel. Co.*, 75 Ala. 168; s. c., 51 Am. Rep. 435.

willful, or so *gross* as to evince an entire want of care.¹

§ 374. **Unintelligible Dispatches Subject to Parol Explanation.**—It has been held that the meaning of a telegraphic message from a live-stock broker to a shipper, couched in such terms as to be understood by the shipper, but which are unintelligible to persons not engaged in the stock business as shippers, may be explained by the testimony of the broker, in an action against the telegraph company for failure to deliver it.²

§ 375. **Evidence that Agent had Information of Nature of Message.**—The obviously sound rule is that the question whether the agent had information of the nature of the message is not to be determined solely by the face of the message itself, but may be shown by *other relevant facts* and circumstances, including the fact that *previous similar messages* had been sent by the same operator with knowledge of their character.³

¹ *Western Union Tel. Co. v. Way*, 83 Ala. 542; s. c., 4 South. Rep. 844.

² *Western Union Tel. Co. v. Collins (Kan.)*, 25 Pac. Rep. 187.

³ *Postal Telegraph Cable Co. v. Lathrop*, 131 Ill. 575; s. c., 7 L. R. A. 474; 30 Cent. L. J. 412; 23 N. E. Rep. 583.

ARTICLE V.—INJURY TO THE FEELINGS.

SECTION.

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§ 378. **Damages Given for Injury to the Feelings Alone.**—Several courts have recently taken the view that damages may be given in an action against a telegraph company for the failure to transmit and deliver a message, where the only element of damages consists in injury to the feelings, and where

there is no element of physical suffering or pecuniary loss.¹

§ 379. **Judicial Observations in Support of this View.**—The Supreme Court of Texas, in holding injury to the feelings an independent element of damage, say: “In cases of bodily injury, the mental suffering is not more directly and naturally the result of the wrongful act than in this case,—not more obviously the consequence of the wrong done than in this case. What difference exists to make the claimed distinction? That it is caused by and contemplated in the doing of the wrongful act is the principle of liability. The wrong-doer knows that he is doing this damage when he afflicts the mind by withholding the message of mortal illness, as well as by a wound to the person.” The Court of Appeals of Kentucky, speaking upon the same subject, say: “Many of the text-writers say that a person cannot recover damages for mental anguish alone, and that he can recover such dam-

¹ *Stuart v. Western Union Tel. Co.*, 66 Tex. 580; reaffirmed in *Wilson v. Gulf, etc. R. Co.*, 69 Tex. 739, and in *Western Union Tel. Co. v. Cooper*, 71 Tex. 507; s. c., 10 Am. St. Rep. 772; 9 S. W. Rep. 598; 1 L. R. A. 728; *Western Union Tel. Co. v. Broesche*, 72 Tex. 654; s. c., 10 S. W. Rep. 734; *Western Union Tel. Co. v. Simpson*, 73 Tex. 423; s. c., 11 S. W. Rep. 385; *Western Union Tel. Co. v. Adams*, 75 Tex. 531; s. c., 6 L. R. A. 844; 12 S. W. Rep. 857; *Wadsworth v. Western Union Tel. Co.*, 86 Tenn. 695; s. c., 6 Am. St. Rep. 864; 8 S. W. Rep. 574; *Reese v. Western Union Tel. Co.*, 123 Ind. 294; s. c., 24 N. E. Rep. 163; *Beasley v. Western Union Tel. Co.*, 39 Fed. Rep. 181; *Western Union Tel. Co. v. Henderson*, 89 Ala. 510; s. c., 7 South. Rep. 419; *Thompson v. Western Union Tel. Co.*, 106 N. C. 549; s. c., 11 S. E. Rep. 269; *Chapman v. Western Union Tel. Co. (Ky.)*, 13 S. W. Rep. 880; *Young v. Western Union Tel. Co.*, 107 N. C. 370; s. c., 11 S. E. Rep. 1044; 42 Abb. L. J. 518; *Thompson v. Western Union Tel. Co.*, 107 N. C. 449; s. c., 12 S. E. Rep. 427.

² *Stuart v. Western Union Tel. Co.*, 66 Tex. 580, quoted with approval in *Western Union Tel. Co. v. Cooper*, 71 Tex. 507; s. c., 10 Am. St. Rep. 772.

ages only where he is entitled to recover some damages upon some other ground. It will generally be found, however, that they are speaking of cases of personal injury. If a telegraph company undertakes to send a message, and fails to use ordinary diligence in doing so, it is certainly liable for some damage. It has violated its contract; and whenever a party does so he is liable at least to some extent. Every infraction of a legal right causes injury, in contemplation of law. The party being entitled in such a case to recover something, why should not an injury to the feelings, which is often more injurious than a physical one, enter into the estimate? Why, being entitled to some damage by reason of the other party's wrongful act, should not the complaining party recover all the damage arising from it? It seems to us that no sound reason can be given to the contrary. The business of telegraphing, while yet in its infancy, is already of wonderful extent and importance to the public. It is growing, and the end cannot yet be seen. A telegraph company is a *quasi* public agent, and as such it should exercise the extraordinary privileges accorded to it, with diligence to the public. If, in matters of mere trade, it negligently fails to do its duty, it is responsible for all the natural and proximate damage. Is it to be said or held, that, as to matters of far greater interest to a person, it shall not be, because feelings or affections only are involved? If it negligently fails to deliver a message which closes a trade for \$100, or even less, it is responsible for the damage. It is said, however, that if it is guilty of like fault as to a message to the husband that the wife is dying, or the father that

his son is dead, and will be buried at a certain time, there is no responsibility save that which is nominal. Such a rule, at first blush, merits disapproval. It would sanction the company in wrongdoing. It would hold it responsible in matters of the least importance, and suffer it to violate its contracts with impunity as to the greater. It seems to us that both reason and public policy require that it should answer for all injury resulting from its negligence, whether it be to the feelings or the purse, subject only to the rule that it must be the direct and proximate consequence of the act. The injury to the feelings should be regarded as a part of the actual damage, and the jury be allowed to consider it. If it be said that it does not permit of accurate pecuniary measurement, equally so may it be said of any case where mental anguish enters into the estimate of injury for a wrong, and it furnishes no sufficient reason why an injured party should not be allowed to look to the wrong-doer for reparation. If injury to the feelings be an element to the actual damage in slander, libel and breach of promise cases, it seems to us it should equally be so considered in cases of this character. If not, then most grievous wrongs may often be inflicted with impunity; legal insult, added to outrage by the party, by offering one cent, or the cost of the telegram, as compensation to the injured party. Whether the injury be to the feelings, or pecuniary, the act of the violator of a right secured by contract has caused it. The source is the same, and the violator should answer for all the proximate damages."¹

¹ *Chapman v. Western Union Tel. Co. (Ky.)*, 13 S. W. Rep. 880; 30 Am. & Eng. Corp. Cas. 626; quoted with approval in *Young v.*

§ 380. **Illustrations.**—A telegraph company, which negligently failed to deliver two telegrams announcing the illness, death, and date of the funeral of the plaintiff's father, was held liable to the plaintiff in substantial damages for the injury to his feelings, without proof of physical pain or pecuniary loss.¹ So, it has been held that if a message is sent to a person, informing him of the dangerous illness of his wife, and the company negligently fails to deliver it for *eight days*, so that he does not get it until after her death and burial, he can recover damages for the mere mental anguish thereby caused.²

§ 381. **Rule Clearer Where the Mental is Coupled with Physical Pain, etc.**—Some of the courts seem to proceed upon the idea that damages for injury to the feelings can only be given where the plaintiff is entitled to recover *other* compensatory damages; in other words, that damages for injury to the feelings can only be given as *supplemental* damages, so to speak. This idea has probably been adopted from the rule which has obtained in respect of *exemplary damages*. Such damages, it is well known, are given for mere *punishment or example*, and can never be given except where the facts disclose grounds for recovering compensatory damages; otherwise a man might bring a civil action for a mere criminal offense. The Supreme Court of Alabama, in a late case, seem to doubt the soundness of this distinction, and hold that whatever the rule may be where the addressee brings the action, yet where it is brought by the

Western Union Tel. Co., 107 N. C. 370; s. c., 11 S. E. Rep. 1044; 42 Abb. L. J. 518.

¹ Chapman v. Western Union Tel. Co. (Ky.), 13 S. W. Rep. 880; s. c., 30 Am. & Eng. Corp. Cas. 626.

² Young v. Western Union Tel. Co., 107 N. C. 370; s. c., 11 S. E. Rep. 1044.

sender of the message, he may recover such damages, because he is entitled to other actual damages for the breach of the contract between him and the defendant, to the extent of the price paid for transmitting the message at least.¹ And it must be observed that the distinction does not rest upon any sound foundation.

§ 382. **Not Given as Exemplary Damages.**—On the contrary, damages for mental suffering, when given, are given on the theory of *compensation*, though the facts may often be such as to authorize a further award of damages by way of punishment or example. Accordingly, a petition which discloses no other ground of recovery than *injury to the feelings* in consequence of the non-delivery of a message, through the mere negligence or forgetfulness of the employees of the company, does not, it has been held, disclose a case for *exemplary*, but of *actual* damages only.² Keeping in mind the rule that exemplary damages are given only in cases of *malice, fraud, oppression, or negligence so gross* as to evince a disregard of social duty and to be, therefore, tantamount to malice,—we are prepared for the view that mental suffering, occasioned merely by the neg-

¹ *Western Union Tel. Co., v. Henderson*, 89 Ala. 510; s. c., 7 South. Rep. 419. So held in *Reese v. Western Union Tel. Co.*, 123 Ind. 224; *Thompson v. Western Union Tel. Co.*, 106 N. C. 549; s. c., 11 S. E. Rep. 269; 30 Am. & Eng. Corp. Cas. 634. On the second appeal in this case the distinction was abandoned. 107 N. C. 449.

² *Stuart v. Western Union Tel. Co.*, 66 Tex. 580; s. c., 59 Am. Rep. 623; distinguishing on this point, *Gulf, etc. R. Co. v. Levy*, 59 Tex. 542; s. c., 46 Am. Rep. 269. In this last case there was no contract relation between him and the company, so the court held that in the failure to deliver the message, the company was only guilty of a tort, and in such a case *actual* damage must be shown, to let in exemplary damages or damages to the feelings. In the *Stuart* case, *supra*, there was a contract relation, and the court held that the two cases were thus distinguishable.

ligent failure to transmit a message containing nothing indicating its special importance, which was not otherwise made known to the agent, is not a ground for the recovery of such damages.¹

§ 383. **Illustrations.**—In view of the foregoing, we may more easily concur with a late holding that where a telegram is sent by a wife, about to be confined, to summon her husband, and by reason of a negligent delay of twenty-four hours in the delivery of the dispatch he did not arrive, whereby the complaint alleges she suffered more physical pain, mental anxiety, and alarm on account of her condition, and sustained permanent and incurable injury for want of his presence and services, such damages are not too remote.² In another case which was an action to recover damages for negligent delay in transmitting a message, the petition set forth that a telegram: "Come immediately, I am very sick," was delivered to the agent of the defendant company for transmission; that he was informed that the sender was the son of the addressee; and that, owing to negligence and delay in sending and delivering the message, the complainant was deprived of the privilege of being with him in the last moments of his life and attending his burial. The court held that the petition set forth

¹ *McAllen v. Western Union Tel. Co.*, 70 Tex. 243; s. c., 7 S. W. Rep. 715. Said the court: "If grief or sorrows produced by things unreal, mere figments of the brain, are held to give a cause of action for a breach of contract or tort, an individual of a somber, glowing imagination, would often be entitled to large damages on account of mental suffering, while others of a buoyant fancy for the same breach of duty would not be entitled to anything; and damages, instead of being measured by the rules of law as applied to the real facts, would largely depend upon the fertility of the imagination of the suitor."

² *Thompson v. Western Union Tel. Co.*, 107 N. C. 449; s. c., 12 S. E. Rep. 427.

a cause of action; and that the elements of actual damage were the cost of the telegram, the expenses of travel, and the mental suffering; and that the fact that a later train, which the complainant was compelled to take, would have taken her to her son in time, but for the fault of the railroad company, was no defense.¹

§ 384. **View that no Damages can be Given for Mere Mental Anguish.**—No damages can, in the view of some courts, be recovered for mere mental anguish or suffering produced by the failure to deliver a telegraphic message, unless (and such a case can hardly be conceived) the failure has resulted in *physical suffering* which is the proximate cause of the mental suffering.² Accordingly, where the action was for damages for failing to deliver a message

¹ *Loper v. Western Union Tel. Co.*, 70 Tex. 689; s. c., 21 Am. & Eng. Corp. Cas. 191; 8 S. W. Rep. 600. So, in Tennessee, it has been lately held that where a person sent a telegram to the plaintiff, his sister, containing information of the serious illness of her brother, and subsequently another one informing her of his death; and by reason of the negligence of the company the dispatches were not delivered, whereby the brother was deprived of that attention at her hands which he would have received but for such negligence, and she in consequence was unable to make preparations for his funeral,—she was held entitled to damages for the wrong and injury done to her affections and feelings. This decision seems to be squarely to the effect that injured feelings, without more, may in such a case be the basis of recovering substantial damages. *Wadsworth v. Western Union Tel. Co.*, 86 Tenn. 695; s. c., 6 Am. St. Rep. 864, (Lurton and Folkes, JJ., dissenting). But there is a ground on which this decision is capable of being “distinguished,” which is the ground on which Mr. Chief Justice Turney concurred, namely, that telegraph companies are liable in damages to the party aggrieved, under the statute of that State (Tenn. Code (T. & S., §§ 1321-1323), (M. & V., §§ 1541, 1542), and that the statute does not discriminate between messages pertaining to matters of a pecuniary nature and those which are sent for the receiver’s personal benefit, and which relate merely to domestic matters.

² *Russell v. Western Union Tel. Co.*, 3 Dak. 315; *West v. Western Union Tel. Co.*, 39 Kan. 93; s. c., 9 Am. St. Rep. 530; 17 Pac. Rep. 807; *Chase v. Western Union Tel. Co.*, 44 Fed. Rep. 554.

in which a son notified his father of the death and funeral of a brother of the latter, it was intimated that damages for the mental disappointment and suffering could not be recovered.² To illustrate, let

² *West v. Western Union Tel. Co.*, 39 Kan. 93; s. c., 9 Am. St. Rep. 530. "Such damages," it is said, "can only enter into and become a part of the recovery where the mental suffering is the natural, legitimate and proximate consequence of the physical injury." *Salina v. Trosper*, 27 Kan. 544. Again, it is said that, "No damages can be recovered for a shock and injury to the feelings and sensibilities, or for mental distress and anguish caused by a breach of a contract, except a marriage contract." *Russell v. Western Union Tel. Co.*, 3 Dak. 315. In *So Relle v. Western Union Tel. Co.*, 55 Tex. 308; s. c., 40 Am. Rep. 805, it was held that a telegraph company is liable for injury to the feelings of a son caused by its neglect to deliver to him a message announcing the death of his mother, whereby he is prevented from attending her funeral. But this decision, which was pronounced by a commission of appeals, was overruled by the Supreme Court of the same State in the subsequent case of *Gulf, etc. R. Co. v. Levy*, 59 Tex. 563; s. c., 46 Am. Rep. 278. This last decision seems to be overruled and the former reinstated by the later case of *Stuart v. Western Union Tel. Co.*, 66 Tex. 580; s. c., 59 Am. Rep. 623, although the court say that the two cases are in conflict only on the single point that injury to the feelings alone would sustain such an action. In *Logan v. Western Union Tel. Co.*, 84 Ill. 468, which was an action by a father against a telegraph company for negligence in failing to deliver a telegram sent by him to his son summoning him to the death-bed of his mother, it was held that the plaintiff was entitled to recover at least nominal damages, including the price paid the company for sending the message,—but nothing beyond this was considered. In *Wyman v. Leavitt*, 71 Me. 227; s. c., 36 Am. Rep. 303, which was an action for damages for injury to real estate by blasting rock, it was held that the mental anxiety of the plaintiff for the safety of herself and family was not a proper element of damages. In *Chase v. Western Union Tel. Co.*, 44 Fed. Rep. 554, Mr. District Judge Newman cited the following authorities as denying the right to recover damages for mental suffering unmixed with any other element of damage: *Russell v. Western Union Tel. Co.*, 3 Dak. 315; s. c., 19 N. W. Rep. 408; *West v. Western Union Tel. Co.*, 39 Kan. 93; s. c., 17 Pac. Rep. 807; *Gulf, etc. R. Co. v. Levy*, 59 Tex. 542, 563; *Wyman v. Leavitt*, 71 Me. 227; *Johnson v. Wells*, 6 Nev. 224; *Nagel v. Railway Co.*, 75 Mo. 653; *Railway Co. v. Stables*, 62 Ill. 313; *Freese v. Tripp*, 70 Ill. 503; *Medel v. Anthia*, 71 Ill. 241; *Joch v. Dunkwardt*, 85 Ill. 333; *Porter v. Railway Co.*, 71 Mo. 83; *Fenelon v. Butts*, 53 Wis. 344; s. c., 10 N. W. Rep. 501; *Ferguson v. Davis Co.*, 57 Iowa, 601; s. c., 10 N. W. Rep. 906; *Stewart v. Ripon*, 38 Wis. 584; *Masters v. Warren*, 27 Conn. 293; *Blake v. Railway Co.*, 10 Eng. Law & Eq. 442;

us take a case where the plaintiff, hearing that his father was sick at E., and wishing to visit him, delivered to the defendant telegraph company at S. a message for transmission to his father at E., which simply directed that a carriage be sent for him at P., the nearest station, seventy-five miles distant from E. The operator was not informed of the father's sickness, and, owing to his fault in not knowing or recollecting that the telegraph office at E. had been abandoned for more than a month, no reply was received. After waiting six days, the plaintiff went to P., and, finding no word from his father, and not being able to obtain a conveyance by the more direct route to E., was obliged to take a circuitous route, a distance of 200 miles by a "buckboard." The court held that no recovery could be had for the mental suffering caused by the failure to receive a reply, or word from the father at P., or the physical pain caused plaintiff in the journey of 200 miles from P. to E. by the "buckboard."

§ 385. **Husband Cannot Recover for Injury to His Own Feelings where the Action is for an Injury to the Wife.**—In Texas, where the husband brings a suit for an injury to his wife, she not being joined—not being, under the procedure in that State, a necessary party,¹ he cannot recover damages against the telegraph company for injury to his feelings. The court so hold, on the theory that such damages were

Lynch v. Knight, 9 H. L. Cas. 577; Burke v. Railway Co., 10 Cent. L. J. 48; Rowell v. Western Union Tel. Co., 75 Tex. 26; s. c., 12 S. W. Rep. 534; Thompson v. Western Union Tel. Co., 106 N. C. 549; s. c., 11 S. E. Rep. 269; 30 Am. & Eng. Corp. Cas. 634.

¹ McAllen v. Western Union Tel. Co., 70 Tex. 243; s. c., 21 Am. & Eng. Corp. Cas. 195; 7 S. W. Rep. 715.

² Texas Central R. Co. v. Burnett, 61 Tex. 638; San Antonio City R. Co. v. Helm, 64 Tex. 147.

too remote and consequential, but do not seem to proceed on the view that he cannot bring an action in right of his wife, and recover damages in his own right. Says COLLARD, J.: "The person who suffers the injuries proximately resulting from the wrong done, and such person alone, is entitled to compensation, except in cases where death results, and the cause of action is made to survive to the relatives by virtue of a statute. The husband can sue for such injuries to his wife, but he cannot recover on his own account for his anxiety and sympathy.'"

§ 386. **The Company must be Apprised of the Special Circumstances.**—As damages for mental suffering, injury to family affection and the like, are given on the footing of compensation, the rule of *Hadley v. Baxendale*¹ applies in such a sense that the company, in order to be held liable for such damages, must have had notice, either through the wording of the dispatch or otherwise, of the *special circumstances* in consequence of which a failure to transmit it seasonably and correctly will entail mental suffering; and such we find to be the law, as recognized in several decisions. The Supreme Court of Texas, in one case, proceeded on the view that the telegram must, to support an action for the recovery of such damages, disclose the relationship of the parties. Accordingly, it was held that a dispatch in the words: "Come on first train; bring Ferdinand; his father is very low,—," which was so delayed that the plaintiff's wife was unable to reach her father before his death,—would not support an action for damages for the mental suffering of the

¹ *Western Union Tel. Co. v. Cooper*, 71 Tex. 507; s. c., 10 Am. St. Rep. 772.

² *Ante*. § 311.

plaintiff's wife.¹ But where the telegram read: "Billie is very low; come at once,"—this was held by the same court sufficient to advise the company of the consequences of failure to deliver the message so as to make it liable for damages consisting of mental suffering,²—the apparent distinction being that the word "father" is not sufficient to convey such information, while the word "Billie" is. Again, where the telegram is sent from A. to B., their surnames being unlike,—reading: "Willie died yesterday evening at six o'clock; will be buried at Marshall Sunday evening"—this was held not to import family relationship between Willie and B., so as to entitle B. to damages for the outrage to his fraternal feelings in failing to hear of his brother's death in time to attend the funeral and condole with his sister.³

§ 387. **Further of this Subject.**—The same court, in a subsequent case, had before it a case of the non-delivery of a message which, without disclosing the relationship of the parties, stated that the person named was dying, and said: "Come quick." Here, the court took the more sensible view that such a message sufficiently disclosed its urgency without stating the relationship of the parties, and held that the addressee who, in consequence of the failure of the company to deliver it, had been prevented from being present at the death-bed of his brother, was entitled to damages for his mental suffering. In giv-

¹ *Western Union Tel. Co. v. Kirkpatrick*, 76 Tex. 217; s. c., 13 S. W. Rep. 70. It should be added that, under the Texas procedure an action is properly brought by the husband alone for injury to his wife.

² *Western Union Tel. Co. v. Moore*, 76 Tex. 66; s. c., 12 S. W. Rep. 949.

³ *Western Union Tel. Co. v. Brown*, 71 Tex. 723; s. c., 10 S. W. Rep. 323; 2 L. R. A. 776.

ing the opinion of the court, HENRY, J., said: "When such communications relate to sickness and death, there accompanies them a common-sense suggestion that they are of importance, and that the persons addressed have in them a serious interest. It would be an unreasonable rule, and one not comporting with the uses of the telegraph, to hold that the dispatcher will be released from diligence unless the relations of the parties concerned, as well as the nature of the dispatch, are disclosed. When the general nature of the communication is plainly disclosed by its terms, instead of requiring the sender to communicate to the unwilling ears of the operator the relationship of the parties concerned, a more reasonable rule will be, when the receiver of the dispatch desire information about such matters, for him to obtain it from the sender, and, if he does not do so, to charge his principal with the information that inquiries would have developed."¹ Turning to the other side of the picture, we find it held in Indiana, in a case where the telegraph company failed for twenty days to deliver the following message addressed by the plaintiff to the husband of his wife's sister: "My wife is very ill; not expected to live,"— that the sender of the message, though suffering no pecuniary loss, is entitled to compensation for the mental anguish he suffered consequent on its non-delivery, as the message was notice to the company that mental anguish would probably come to some one if not promptly delivered.²

¹ *Western Union Tel. Co. v. Adams*, 75 Tex. 531; s. c., 6 L. R. A. 844; 12 S. W. Rep. 857.

² *Reese v. Western Union Tel. Co.*, 123 Ind. 294; s. c., 24 N. E. Rep. 163; 7 L. R. A. 583.

§ 388. **Further Views as to the Measure of Damages in Such Cases.**—It has been reasoned, in a case where the message alleged to have been delayed informed the plaintiff of the probable death of his wife, that the recovery is measured by a proper compensation for the disappointment and anguish suffered by the plaintiff's inability to be with his wife before her death, no punitive damages nor damages for the grief naturally arising from the wife's death being allowed.¹ Under the Code of Civil Procedure of Texas, a husband can sue for injuries of body and mind sustained by his wife on account of the failure of a telegraph company to deliver a message to summon a physician, but if he sues in right of his wife, he cannot recover on his own account for his own anxiety and sympathy.² In the same State a general demurrer to the petition, in an action for damages against a telegraph company, is properly sustained, where the only damage sustained is the mental and physical suffering of the plaintiff and his wife, resulting from the defendant's failure to deliver a message relating to the health of the plaintiff's *mother-in-law*, his wife's mother.³ Nor, in such a case, are damages for mere *continued anxiety* caused by such failure, recoverable.⁴ In a recent case in Tennessee, where it appeared that, by reason of a telegraph company's negligent

¹ *Beasley v. Western Union Tel. Co.*, 39 Fed. Rep. 181.

² *Western Union Tel. Co. v. Cooper*, 71 Tex. 507; s. c., 10 Am. St. Rep. 772; 1 L. R. A. 728; 9 S. W. Rep. 598. That the wife is not a necessary party, the court cite *Texas, etc. R. Co. v. Burnett*, 61 Tex. 638; *San Antonio, etc. R. Co. v. Helm*, 64 Tex. 147.

³ *Rowell v. Western Union Tel. Co.*, 75 Tex. 26; s. c., 12 S. W. Rep. 534.

⁴ *Ibid.* This unsatisfactory decision attempts, but without success to distinguish the previous decision of the same court in *Stuart v. Western Union Tel. Co.*, 66 Tex. 590.

delay in the transmission and delivery to a sister of messages informing her of the serious illness, and, later, of the death of her brother, she was denied the opportunity of attending him and making preparations for his funeral, it was held that the damages might include such sum as would compensate for the *grief, disappointment*, and other injury to her feelings.¹

§ 389. **Failure to deliver a Telegram calling a Physician in a Case of Confinement.**—Where the telegram was addressed to a physician by a husband whose wife was about to be confined, asking him to come at once, and to bring the physician's wife, who was the sister of the patient,—it was ruled that the fact that the child died before birth, and that grief and sorrow were thereby occasioned to the mother, could not be regarded as an element of damage. The court said: "If it is made to appear, from the testimony, that Mrs. Cooper suffered more physical pain, mental anxiety, and alarm on account of her own condition than she would have done if Doctor Keating had been in attendance upon her, and the failure to secure his services is shown to be due to the want of proper care on the part of defendant's servants, whose duty it was to deliver the message, a fair and reasonable compensation should be allowed for such increased pain and mental suffering; but the death of the child—the bereavement of the parents and their grief for its loss,—cannot be considered as an element of damages. Such damages are too remote; they are the result of a secondary cause, and ought not to be

¹ *Wadsworth v. Western Union Tel. Co.*, 86 Tenn. 695; s. c., 6 Am. St. Rep. 864; 8 S. W. Rep. 574 (Lurton and Folkes, JJ., dissenting).

allowed to enter into a verdict. This is not an action under the statute by the parents for the death of a child, and if it were, injury to the feelings of the parent could not be a basis of recovery by them.¹ Injury to the mother alone, her physical pain and mental suffering because of her own condition, would be a proper consideration, and it would be correct to allow proof that the child was still-born, if such fact tended to show that the labor was thereby prolonged, and her suffering so increased.”²

§ 390. Difference between Quantity of Pain Suffered and Quantity which would have been Suffered.

—In the case above stated, an instruction was approved which distinguished the increase of suffering, caused by the non-attendance of the doctor, from the pain which the plaintiff's wife would have suffered, if he had attended her,—the court saying: “If the servants of the company were in fact negligent, and, by reason of such negligence, the pain and suffering of Mrs. Cooper were aggravated and prolonged, she could only recover for such aggravated and prolonged suffering, as distinguished from the suffering she would have encountered in case there had been no such negligence, and Doctor Keating had arrived in time to have waited on her.”³

§ 391. What if the Doctor could not have Reached the Patient in any Event.—In such an action, it was held that the court should have instructed the jury, that if the doctor could not have reached the patient

¹ Citing 3 Wood Railw. Law, 1538, and note 3.

² *Western Union Tel. Co. v. Cooper*, 71 Tex. 507; s. c., 10 Am. St. Rep. 772.

³ *Western Union Tel. Co. v. Cooper*, 71 Tex. 507; s. c., 10 Am. St. Rep. 772.

in time to have attended her confinement, even if there had been no negligence on the part of the defendant in delivering the message, no recovery could be had for the pain and suffering resulting to her by reason of the fact that he was not present to aid in the delivery of the child.¹

§ 392. **Damages for Failure of Husband to Attend his Wife in Case of Confinement.**—In England, a husband never attends upon his wife in case of her confinement, but is always excluded from the apartment, and she is remitted to the care of the surgeon, or the midwife, and the female attendants. But we have progressed so far in this country from the barbarous habits of our English brethren, that with us it has been judicially ascertained that the services of the husband on such an interesting and important occasion may be absolutely necessary to save the wife from incurable injury. Thus, where a telegram was sent by a wife about to be confined, to summon her husband, and by reason of a negligent delay of twenty-four hours in its delivery he did not arrive, whereby the complaint alleged that she suffered more physical pain, mental anxiety and alarm on account of her condition, and sustained permanent and incurable injury for want of his presence and services, it was held that such damages were not too remote.²

§ 393. **Quantum of Damages for Mental Suffering.**—Where the telegram announced the sending

¹ *Western Union Tel. Co. v. Cooper*, 71 Tex. 507; s. c., 10 Am. St. Rep. 772.

² *Thompson v. Western Union Tel. Co.*, 107 N. C. 449; s. c., 12 S. E. Rep. 427. The account given by Mrs. Thompson as to all she suffered through the delay of her husband in getting there, although the doctor and her sister-in-law were with her, is truly pathetic.

of the corpse of the plaintiff's wife, and the servant of the company who received the dispatch for transmission knew the special circumstances, and the dispatch travelled with only the customary speed of the company, in consequence of which the corpse got there first, the court held that a verdict for \$1,168 was not excessive.¹ Where the plaintiff, a widow, was far from home with the dead body of her husband, and telegraphed for a remittance of money to enable her to leave with it, but, in consequence of the delay in transmitting the message, was delayed two days,—the court refused to disturb a verdict for \$1,000.²

¹ *Western Union Tel. Co. v. Broesche*, 72 Tex. 654; s. c., 10 S. W. Rep. 734.

² *Western Union Tel. Co. v. Simpson*, 73 Tex. 422; s. c., 11 S. W. Rep. 385.

ARTICLE VI.—MISCELLANEOUS HOLDINGS.

SECTION.

- 398. Exemplary Damages, when Given.
- 399. Financial Condition of Sender.
- 400. A Case where "Liberal Damages" were Allowed.
- 401. Damages under the Wisconsin Statute.
- 402. Special Damages must be Alleged and Proved.
- 403. Further as to Proof of Damages.
- 404. Claiming One Kind of Damage of the Company and Recovering Another.

§ 398. **Exemplary Damages, when Given.**—Cases may obviously arise where exemplary damages may be given against a telegraph company for failing to deliver a message. It was ruled in a recent case in Kansas, that, where it is established that there was such *gross negligence* on the part of the agents of the telegraph company as to indicate *wantonness* or a *malicious* purpose in failing to transmit and deliver a message, then the plaintiff would be entitled to exemplary damages.¹ But here, by analogy to a rule already stated,² the rule is that no exemplary damages can be recovered where no *actual damages* are shown.³ Moreover, in order to justify exem-

¹ *West v. Western Union Tel. Co.*, 39 Kan. 93; s. c., 7 Am. St. Rep. 530; 7 Pac. Rep. 807. See *Scott & Jarn. Tel.* §§ 417, 418.

² *Ante*, § 382.

³ *Shippell v. Norton*, 38 Kan. 567. Compare as to exemplary damages *Southern Kansas R. Co. v. Rice*, 38 Kan. 398; *Flanagan v. Womack*, 54

plary damages, it will often be as important, and generally more so, that the company should have notice of the special circumstances which require urgency; for the existence of *gross negligence*, *wantonness*, or *malice*, which are the essential foundation of this species of damage, will quite as often depend upon the fact of the company having knowledge of the importance of the message as in cases of actual damage,—and this, although the theory on which exemplary damages are given is quite different. It has been held in Texas, that the plaintiff is not prejudiced or restricted as to the amount of actual damages which he may recover, by the fact that, in the *claim* presented by him to the company, he classified the amount of his damages as *actual* and *exemplary*.¹

§ 399. **Financial Condition of Sender.**—It has been held that evidence of the embarrassed financial condition of the sender of the message is not admissible, as bearing on the question of damages for loss of the bargain.²

§ 400. **A Case where "Liberal Damages" were Allowed.**—In an Ohio case, the court said: "We admit, as a general rule, that the measure of damages for a breach of contract is the amount of loss really sustained by the injured party; but in the application of this rule a liberal course may be pursued, whenever the violation of an agreement is proved to have been *willful* or *causeless* on the part

Tex. 45; Freese v. Tripp, 70 Ill. 496; Gulf, etc. R. Co. v. Levy, 59 Tex. 563; s. c., 46 Am. Rep. 278.

¹ Western Union Tel. Co. v. Morris, 77 Tex. 173; s. c., 13 S. W. Rep. 888.

² Western Union Tel. Co. v. Way, 83 Ala. 542; s. c., 4 South. Rep. 844.

of the defendant." The plaintiff was engaged in Cincinnati as a commercial news-agent, and engaged in furnishing to his customers financial news and reports, from New York city, of the state of the market. He alleged that the defendant, a telegraph company, wrongfully and maliciously intending to injure him in his business, purposely delayed the sending and delivering to him of messages sent by his agents, giving precedence to a rival commercial news-agency. It was claimed that the damages allowed by the jury—\$3,000—were excessive; that the greatest estimate of the actual damages sustained would not be more than \$450. The court was satisfied that the verdict was greatly in excess of the damages the plaintiff really sustained; and, while it reduced the amount by a *remittitur* of \$2,000, said: "It is evident that the mere allowance of the amount of loss the plaintiff proved he actually sustained, would not, in justice, remunerate him for the violation by the defendant of its agreement, and the jury might very properly have given an additional sum.¹

§ 401. **Damages Under the Wisconsin Statute.**—The statute of Wisconsin² providing that telegraph companies shall be "liable for all damages occasioned by failure or negligence of their operators, servants, or employees in receiving, copying, transmitting, or delivering dispatches or messages," renders them liable for damages resulting directly from their negligence in transmitting messages; especially where the agent knows the contents and significance of the message. Items of expense to

¹ Davis v. Western Union Tel. Co., 1 Cin. Superior Ct. 100.

² Laws Wis. 1885, ch. 171.

which the plaintiff may have been put, in order to be recoverable from the company, must be shown to have been incurred because of the failure to transmit the message seasonably; and it is held that, in the absence of such proof, there could be a recovery only for the amount paid for the message.¹

§ 402. **Special Damages must be Alleged and Proved.**—In these actions, the damages sustained through the negligence or willful failure of the company to transmit and deliver the message promptly and correctly, fall within the class of damages which the law books usually denominate *special* or *consequential*. The well-known rule is that such damages must be both *alleged* and *proved*. In these cases, unless they are both alleged and proved, the plaintiff can recover no more than the cost of sending the message,²—except, of course, where he sues under a statute,³ or upon a contract which liquidates damages. He cannot, for instance, recover damages for mental anguish, unless he both *alleges* and *proves* the special circumstances rendering a prompt performance of the duty assumed by the defendant of more than ordinary importance.⁴

§ 403. **Further as to Proof of Damages.**—The burden is, then, on the plaintiff to prove the amount of his loss, and the law will not help him out by the aid of surmises or conjectures. If he claims dam-

¹ *Cutts v. Western Union Tel. Co.*, 71 Wis. 46; s. c., 36 N. W. Rep. 627.

² *Cutts v. Western Union Tel. Co.*, 71 Wis. 46; s. c., 36 N. W. Rep. 627.

³ *Ante*, § 157 *et seq.*

⁴ The mental anguish in this case was that which naturally flows from the non-delivery of a dispatch asking for a remittance of money. *Western Union Tel. Co. v. Simpson*, 73 Tex. 423; s. c., 11 S. W. Rep. 385.

ages on the ground that the failure to deliver the dispatch resulted in his losing a job of work,¹ and it appears that he earned *something* during the time the job would have lasted, he must show what he earned; for *non constat* but he may have earned more than the amount which he would have under the job which he lost.² In another case already noticed, it was held that the failure to deliver a telegraphic message summoning a physician to attend the sender's wife, who died a few days thereafter, will not entitle the sender to recover for the loss of his wife's services, in the absence of evidence tending to show that she would not have died if the message had been promptly delivered.³ In another case the plaintiff, a merchant of St. Louis, had a lot of coonskins stored with a dealer in New York city. Pursuant to plaintiff's request, the New York dealer telegraphed the price of such skins as "sixty-two and one-half cents." This message was erroneously transcribed by the telegraph operator as "sixty-five and one-half cents," and on receipt of it plaintiff ordered the sale of the skins. In the action to recover the difference between the two amounts on the whole lot of skins, plaintiff failed to prove the sale as ordered. In other words, he failed to prove that he had been misled by the mistake into selling his coonskins at less than the market price, or at all. It was, of course, held that he could recover only the cost of sending the message with interest.⁴ In still another case the plaintiff's agent telegraphed him

¹ *Ante*, § 346 *et seq.*

² *Western Union Tel. Co. v. Longwill* (N. M.), 21 Pac. Rep. 339.

³ *Western Union Tel. Co. v. Kendzora*, 77 Tex. 257; s. c., 13 S. W. Rep. 986.

⁴ *Levy v. Western Union Tel. Co.*, 35 Mo. App. 170.

the price at which he could buy apples, but, owing to a mistake by the telegraph company in the address and signature, the plaintiff paid no attention to it. The price of apples advanced, and the plaintiff was obliged to pay more than the price named in the telegram. In an action for damages, there was no evidence of any difference between the cost of a car-load at the price named and the value of the same in the same market at the same time. It was held that only the amount paid for the telegram could be recovered.¹ This case would seem to have been correctly decided on another ground. It would seem to fall within the rule, or exception which excludes recovery for uncertain and contingent profits. Even if there had been evidence of the value of the apples by the car-load on the day named, *non constat* that the plaintiff would have bought them. He might and he might not. He may not have had the money to buy them, or other reasons may have operated to induce him not to buy, although the market may have been favorable.

§ 404. **Claiming One Kind of Damages of the Company and Recovering Another.**—It has been held that where the sender of a telegram presents, in accordance with the contract with the telegraph company, a claim for damages for failure to deliver the message, and classifies the damages as “\$50 actual damage, and \$5,000 exemplary damage,” such classification does not prejudice him so as to prevent his recovering over \$50 in actual damage, and nothing as exemplary damage.²

¹ *Pennington v. Western Union Tel. Co.*, 87 Iowa, 631; s. c., 56 Am. Rep. 367.

² *Western Union Tel. Co. v. Morris*, 77 Tex. 173; s. c., 13 S. W. Rep. 888.

CHAPTER XII.

CONTRIBUTORY FAULT OF THE PLAINTIFF.

SECTION.

- 410. Duty of the Person Damaged, on Discovering the Failure of the Company.
- 411. How Damages Affected by Subsequent Action of Plaintiff.
- 412. Case where the Plaintiff was Exonerated from Charge of Subsequent Negligence.
- 413. When not Bound to Notify Company of Error.
- 414. Reselling and Charging Company with Difference.
- 415. Plaintiff not Bound to Invest Further Money.
- 416. Contributory Negligence of the Sender.
- 417. Contributory Negligence of the Person Receiving the Message.

§ 410. **Duty of Person Damaged, on Discovering the Failure of the Company.**—It is said that “the law, for wise reasons, imposes upon a party subjected to injury from a breach of contract, the active duty of making reasonable exertions to render the injury as light as possible. Public interest and sound morality accord with the law in demanding this; and if the injured party, through negligence or willfulness, allows the damages to be unnecessarily enhanced, the increased loss justly falls upon him.”¹

§ 411. **How Damages Affected by Subsequent Action of Plaintiff.**—What the measure of damages

¹ Hamilton v. McPherson, 28 N. Y. 72, 76.

would be in a case where a telegraph company had made an error in the transmission of a message, and how such damages might be affected by the subsequent action of the plaintiffs, is so fully set out in the syllabus of a Virginia case that we give all that portion of it necessary to understand the ruling of the court on this subject: "In an action against a telegraph company for damages sustained by the plaintiffs in consequence of a mistake in the transmission of a message sent on their line, whereby an order to the plaintiffs' factors, in Mobile, to buy five hundred bales of cotton, was altered to twenty-five hundred, * * * and the factors having bought two thousand and seventy-eight bales of cotton before the mistake in the message was ascertained, if the company is liable to the plaintiffs for the damages arising from the alteration of the message, the commissions of the factors upon the purchase of the cotton are a part of the damages for which the company is liable, and the plaintiffs are not bound to accept any offer of the company to pay the damages which excludes these commissions. In such case, if the company is liable to the plaintiffs for damages arising from the alteration of such message, the measure of these damages is what was lost on the sale, at Mobile, of the excess of the cotton above that ordered; or, if not sold there, what would have been the loss on the sale of the cotton at Mobile in the condition and circumstances in which it was when the mistake was ascertained, including in such loss all the proper costs and charges thereon. When the mistake was ascertained, a part of the cotton was on board of a ship, to be sent to Liverpool; a part was under a contract of affreightment

to the same place, but not on board. The whole should have been sold as it was at Mobile; and the plaintiffs having sent it to Liverpool and sold it there, the loss of the company is not to be increased by this act of the plaintiffs, but must be based upon an estimate of what it would have sold for,—a part on shipboard, and a part under contract of affreightment. If the plaintiffs sent the cotton to Liverpool for purposes of speculation, with the intention of taking to themselves the profits, if any, and, in the event of a loss, visiting the loss on the company, they are not entitled to recover for any loss sustained upon it. But if the plaintiffs sent the cotton to Liverpool, not with the purpose of taking the profits, if any, but only to indemnify themselves out of the proceeds to the extent of the cost and the obligations incurred by them, they do not thereby lose their right to recover from the company the damages which they would have sustained if the cotton had been sold at Mobile. The plaintiffs, if they intended to hold the company responsible for the excess of the cotton purchased, should, as soon as they were apprised of the purchase, have *notified the company* of such intention; should have made a tender of such excess to the company, on the condition of its paying the price and all the charges incident to the purchase; and also that, in case of its refusal to accept said tender and comply with its conditions, they would proceed to sell such excess at Mobile, and, after crediting said company with the net profits, would look to it for the difference between the amount of such proceeds and the cost of the excess, including all proper charges; and, upon the failure

of the company, after notice, to accede to their offer, they should have proceeded accordingly.”¹

§ 412. **Continued: Case where the Plaintiff was Exonerated from Charge of Subsequent Negligence.—**

In a New York case, a portion of the opinion in which we have heretofore quoted,² it appeared that a telegram was sent by an agent of the plaintiffs at Chicago to another agent of the plaintiffs at Oswego, ordering him to send to Chicago five thousand sacks of salt. By the negligence of the telegraph company in transcribing it, the telegram, as delivered, ordered him to send to Chicago five thousand casks of salt. The term “sacks,” in the salt trade, designates fine salt, in sacks containing fourteen pounds, and the term “casks” designates coarse salt, in packages containing not less than three hundred and twenty pounds. He accordingly chartered a vessel, put twenty-seven hundred and thirty-three barrels of coarse salt on board. The bill of lading was made out and delivered, and the master of the vessel had received his clearance, when the plaintiffs’ agent received a telegram apprising him of the mistake. At this time, which was in the afternoon, the agent knew that the vessel had finished loading, and supposed that she had left the harbor, as vessels at that season usually hurried their departure; but he made no effort to ascertain with certainty. In fact, the vessel did not sail till five o’clock the next morning. It was claimed by the defendants that the plaintiffs’ agent was guilty of negligence in not stopping and unloading the vessel, after he had received the

¹ Washington, etc. Tel. Co. v. Hobson, 15 Gratt. (Va.) 122.

² Leonard v. New York, etc. Tel. Co., 41 N. Y. 544.

plaintiffs' dispatch correcting the error, and thus avoiding most of the damage which plaintiffs sustained. But the court held that the plaintiffs' agent was only bound to ordinary diligence; that, in relying upon the facts which he knew concerning the vessel, and supposing she had actually sailed, he had exercised it; and that he was not guilty of such negligence as would relieve the defendants from full liability for their negligence.

§ 413. **When not Bound to Notify Company of Error.**—In another case, by an error, the message as received read "five hundred," instead of "five Hudson," as sent, and the plaintiffs' agent, to whom it was directed, purchased five hundred shares of Michigan Southern stock, instead of a like number of Hudson River Railroad stock, which was meant by the parties telegraphing, and immediately after the purchase the agents notified the senders of the message, who, without notifying the telegraph company of the error which had occurred, took immediate steps to correct its effects, so far as they could. It was said by the court that they knew of no rule of law that required the plaintiffs to *notify* the defendants of the error. When the plaintiffs were notified of the error, the damage had already been done, and they had the right at once to sue the defendants, and the suit could not be defeated either by a tender of the stock or the damages.¹

¹ Rittenhouse v. Independent Line of Telegraph, 44 N. Y. 263 (affirming 1 Daly, 474). In the court below it was said that stock purchased in consequence of such mistake should not be sold without notice to the company, if the plaintiffs desire to hold them responsible for any loss resulting from the sale. Rittenhouse v. Independent Line of Telegraph, 1 Daly (N. Y.), 474. Compare Washington, etc. Tel.-Co. v. Hobson, 15 Gratt. (Va.) 122; *Ante*, § 411.

§ 414. **Reselling and Charging Company with Difference.**—The following report of a case in the Supreme Court of New York¹ is taken from *Scott and Jarnagin on Telegraphs*.² The message delivered for transmission was as follows: "Philadelphia, March 15, 1864. To Drexel, Winthrop & Co. If the gold bill is vetoed, buy immediately one hundred thousand. [Signed] Smith & Randolph." The message actually transmitted and delivered was: "Philadelphia, March 15, 1864. To Drexel, Winthrop & Co. Gold bill is vetoed, buy immediately one hundred thousand. [Signed] Smith & Randolph." The complaint stated that Drexel, Winthrop & Co., immediately upon receipt of this message, purchased \$100,000 of gold coin for \$162,225, and that their commissions for purchasing were \$125, and notified the plaintiffs thereof by telegraph. The plaintiffs, upon receipt of this message, discovering the error committed by the company, sent the following dispatch immediately: "Philadelphia, March 15, 1864. Don't buy any more. You had better sell the hundred thousand out at once. The company has made the mistake. See the manager. [Signed] Smith & Randolph." Upon the receipt of this message, Drexel, Winthrop & Co. at once sold the gold for \$160,562, exclusive of commissions for making the sale. The case was tried before the court, without a jury, and the finding was in accordance with this statement. It was found that the gold was bought at the market price, and sold at the highest price that could be obtained. The court decided that Drexel, Winthrop & Co., who were brokers, were

¹ *Smith v. Independent Line of Telegraph*.

² Sec. 412, p. 399, *note*.

entitled to the commissions, which sum should be deducted from the gross proceeds of the sale; and that the plaintiffs, by reason of the neglectful and careless acts of the defendants, sustained damage to the amount of \$2,488, and gave judgment accordingly. An appeal was taken to the General Term, with what result is not known. One of the questions presented in defense was, that if the gold was in fact purchased in reliance upon the erroneous message, and was in the plaintiffs' hands when the error was discovered, it was the duty of the plaintiffs, before selling, to inform the defendants of the error and the purchase, and give the defendants an opportunity to take the gold; and that, in selling the gold without such notice, they deprived the defendants of the right to assume the purchase and indemnify the plaintiffs, and thereby ratified the erroneous message and lost their right of action against the defendants.

§ 415. **Plaintiff not Bound to Invest Further Money.**—Certainly, the plaintiff is not bound to invest further money to save himself from the loss which the company's negligence has entailed upon him, unless he has the money to invest, and unless it is shown that the circumstances were such that a reasonable man would have done so. This is well illustrated by a case where the plaintiffs sued the defendant for delay in transmitting a telegram sent to them by a bank holding notes for collection for plaintiffs against a failing debtor. Through failure to deliver the message promptly, other creditors attached the property of the debtors before plaintiffs received the message; and the property, when sold by the sheriff, brought less than the amount of their

attachment liens. The court held that the fact that the estimated value of the real estate sold by the sheriff was greater than the amount realized at the sale, and sufficient to pay plaintiffs' claim, did not impose on the plaintiffs the duty of buying the same, and discharging the prior liens, in the absence of evidence that plaintiffs were able to do so, and that it was their duty, as ordinarily prudent men, to do so.¹

§ 416. **Further as to Contributory Negligence of the Sender.**—The contributory negligence of the person sending the message may bar his right of recovery. The Supreme Court of Indiana has held that a person addressing a telegram to "Mrs. La Fountain, Kankakee," a city of twelve thousand inhabitants, and failing to make the address more definite, on the company calling his attention thereto, is guilty of contributory negligence barring recovery of a statutory penalty for failure of a company to properly transmit.²

§ 417. **Contributory Negligence of the Person Receiving the Message.**—In the case of a mistake in a message, which is of such a character as to convey to the receiver the suggestion that it is probably the result of mistake, if the receiver goes ahead and acts on conjecture, without having the message repeated back, or taking any other measure to ascertain whether or not it is a mistake, he will be precluded by his own negligence from recovering damages, under the ordinary rule of contributory negligence. This is well illustrated by a case in which the plaintiff sent a dispatch in relation to certain bonds which

¹ *Western Union Tel. Co. v. Sheffield*, 71 Tex. 570; s. c., 10 S. W. Rep. 752.

² *Western Union Tel. Co. v. McDaniel*, 103 Ind. 294.

concluded: "Hatch says hold undoubted." As delivered the message read: "Hatch says hold undoubted." The plaintiff's agent, interpreting this as an order to sell, sold the bonds without having the message repeated, or making further inquiry. It was held that the sale was attributable to the negligence of the plaintiff's agent in omitting inquiry and acting on conjecture, and consequently that there could be no recovery.¹

¹ Hart v. Direct, etc. Tel. Co., 86 N. Y. 633.

CHAPTER XIII.

PARTIES TO ACTIONS AGAINST TELEGRAPH COMPANIES.

SECTION.

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- 442. In Case of Refusal of Connecting Line to Forward.
- 443. Husband Suing for Wife—Texas Code.

§ 422. English Rule that Sender only can Sue.—
In England, by analogy to the doctrine which ap-

plies in respect to common carriers and other bailees, it is held that no action will lie against a telegraph company by the person addressed for the mis-delivery of a telegram or error in its transmission, unless there is either a *contract* between him and the company, or *fraud* on the part of the company in respect of the duty which it has assumed.¹

§ 423. **Even in the Case of Malfeasance.**—Under the English rule, the company will not be liable to the receiver of a telegram, even for *misfeasance*. This is shown by a case where the plaintiffs, merchants at Valparaiso, received a message erroneously directed to them by the company's agent, purporting to come from their branch house at Liverpool, instructing them to ship barley, and did so, and great pecuniary loss resulted in consequence of a fall in the market. The message was, in fact, neither sent by their Liverpool branch nor intended for the plaintiffs, but was sent by another Liverpool firm to their correspondent at Valparaiso. It was held that the plaintiffs owed the defendants no duty growing out of contract, as the only contract made was with the person employing them to send the message, nor were they liable by reason of negligence; because, said *CORRON, L. J.*: "It is impossible to suppose that the company, in the ordinary course of their business, warrant that the message comes from a particular person, for they would thereby make a representation of the truth of which,

¹ *Dickson v. Reuter's Tel. Co.*, 2 C. P. Div. 62; s. c., 46 L. J. (C. P. Div.) 197; 35 L. T. (N. S.) 842; 25 W. R. 272; 19 Moak Eng. Rep. 313; s. c., affirmed on appeal, 37 L. T. (N. S.) 370; 26 W. R. 23; 3 C. P. Div. 1; 30 Moak Eng. Rep. 1; *Playford v. United Kingdom Tel. Co.*, L. R. 4 Q. B. 706; s. c., 10 Best & S. 759; 38 L. J. (Q. B.) 249; 17 L. T. (N. S.) 243; L. R. 4 Q. B. 706; 16 Week. Rep. 219; 17 Week. Rep. 968.

in many cases, they cannot ascertain."¹ The remarks of the learned justice would seem to apply only in cases of forged telegrams. The force of this argument is not perceived in cases like the one in which it was made, where the mistake arose wholly from the negligence of their agent in deciphering the dispatch.

§ 424. **Unsoundness and Injustice of the English Rule.**—The English rule does not rest on any sound principle, and proceeds upon a gross indifference to justice. The receiver of the message, who is damaged by the mistake of the company, must surely have an action either against the company, or against the sender of the message, on the theory that the company is the agent of the sender. But the sender of the message may be insolvent, and therefore the receiver is left remediless against the real author of the wrong. It is idle to explore such conceptions as that the receiver can procure the sender of the message to sue for his benefit, or that the sender may sue and recover, and the receiver have an action over against him. Such conceptions, which deny a direct remedy against the real author of the wrong, are unworthy of any civilized system of jurisprudence. The gross injustice of the English rule is not only illustrated by the case cited in the preceding section, but also by the following case: The plaintiff, having a cargo of ice on board a ship at Grimsby, telegraphed to R. and H. at Hull, asking them to make an offer for it, and requesting them to send an answer by telegraph. R. and H. sent to the office of a telegraph company a message for

¹ *Dickson v. Reuter's Tel. Co.*, 2 C. P. Div. 62; s. c., affirmed in Court of Appeals, 3 C. P. Div. 1, and also as cited in preceding section.

transmission to the plaintiff, by which they offered to take the cargo at 23*s.* per ton. In the reading of the message at the office in London a mistake was made in the figures, and the telegram sent to the plaintiff represented the offer as being 27*s.* instead of 23*s.* per ton. The plaintiff, thereupon, in acceptance of the supposed offer, ordered the ship to proceed to Hull; she arrived there, but R. and H. refused to receive the cargo, except at 23*s.* per ton. The plaintiff brought an action against the telegraph company to recover damages in respect of the injury which he had sustained by reason of the mistake. It was held that the company were not liable,—the obligation upon them to use due care and skill in the transmission of the message arising out of contract, and there being no contract between them and the plaintiff.¹

§ 425. **Exception where Sender is Agent of Addressee.**—The English judges recognize an exception to this rule in the case where the sender of the message sustains to the person to whom it is sent the relation of *agent*, through which relation privity of contract is established.²

§ 426. **American Rule—Action by Addressee for Non-Delivery.**—On a principle which has obtained some foothold in American jurisprudence, that where two persons make a contract for the benefit of a third, such third person may maintain an ac-

¹ Playford v. United Kingdom Electric Telegraph Company, 10 Best & S. 759; s. c., 21 L. T. (N. S.) 21; 17 W. R. 968; 38 L. J. (Q. B.) 249; L. R. 4 Q. B. 706. See s. c., 17 L. T. (N. S.) 243; 16 W. R. 219.

² Playford v. United Kingdom Electric Telegraph Company, L. R. 4 Q. B. 706, and as cited in preceding section.

tion thereon,¹—it has been held that where a message is sent for the benefit of the person to whom it is addressed and is not delivered, he may maintain an action against the telegraph company for the damages which he has sustained through its non-delivery.²

§ 427. **View Which Sustains the Right of Action in the Addressee.**—The true view, which seems to sustain the right of action in the receiver of the message, or in the person addressed, where it is not delivered, is one which elevates the question above the plane of mere privity of contract, and places it where it belongs, upon the *public duty* which the telegraph company owes to any person beneficially interested in the message, whether the sender, or his principal, where he is agent, or the receiver, or his principal, where he is agent. In Texas it is reasoned, with manifest good sense, that the question as to who may maintain such an action does not

¹ Many authorities could be found to support the text, and the weight of American authority in America is believed to be so; but there are many American cases that agree with the English courts, and hold that a person who is not a party to a simple contract, and from whom no consideration moves, cannot sue on the *contract*, and consequently that a promise made by one person to another, for the benefit of a third person who is a stranger to the consideration, will not support an action by the latter. See *Burton v. Larkin*, 36 Kan. 246; s. c., 59 Am. Rep. 541; *Exchange Bank v. Rice*, 107 Mass. 37; s. c., 9 Am. Rep. 1; *Rogers v. Union Stone Co.*, 130 Mass. 581; 39 Am. Rep. 478.

² *West v. Western Union Tel. Co.*, 39 Kan. 93; s. c., 7 Am. St. Rep. 530; *Wadsworth v. Western Union Tel. Co.*, 86 Tenn. 695; s. c., 6 Am. St. Rep. 864. Thus, a physician to whom a telegram requesting his service is sent, can maintain an action against the company for failure to deliver the message. *Western Union Tel. Co. v. Longwill* (N. M.), 21 Pac. Rep. 339. See also *Harris v. Western Union Tel. Co.*, 9 Phila. (Pa.) 88; *De Rutte v. Albany, etc. Tel. Co.*, 1 Daly (N. Y.), 547, 556; s. c., 30 How. Pr. (N. Y.) 403; *Rose v. United States Tel. Co.*, 3 Abb. Pr. (N. S.) (N. Y.) 409; s. c., 34 How. Pr. (N. Y.) 308; *Western Union Tel. Co. v. Fenton*, 52 Ind. 1; *De La Grange v. Southwestern Tel. Co.* 25 La. An. 383

depend upon the payment of the fee, or upon the question whether the sender had been previously constituted an agent for that purpose by the party to whom the dispatch is sent, but upon the question who in fact was to be served, and who is damaged.¹ "It seems reasonable," said WOODWARD, J.,² "that, for all purposes of liability, the telegraph company shall be considered as much the agent of him who receives as of him who sends the message. In point of fact, the fee is often paid on delivery; and I am inclined to think the company ought to be regarded as the common agent of the parties at either end of the wire."³ But, however this might be, the learned judge was clear that the company might be liable for *misfeasance* to third parties. In North Carolina the receiver of a message, informing him of the dangerous illness of his wife, can maintain an action against the telegraph company for injury to his feelings caused by its gross negligence in *delaying* to deliver the message.⁴

§ 428. **Action by Addressee for Mistake.**—By the American rule, if a *mistake* has been made in the transmission of a message, whereby the party to whom it is addressed has sustained an injury, he may maintain an action against the company for negligence, grounded on a neglect of the duty which they have assumed toward him.⁵ It has been rea-

¹ Western Union Tel. Co., v. Adams, 75 Tex. 531; s. c., 6 L. R. A. 844; 12 S. W. Rep. 857.

² New York, etc., Tel. Co. v. Dryburg, 35 Pa. St. 303; s. c., 78 Am. Dec. 338.

³ See also Aiken v. Telegraph Co., 5 So. Car. 358; De La Grange v. Southwestern Tel. Co., 25 La. An. 383.

⁴ Young v. Western Union Tel. Co., 107 N. C. 370; s. c., 11 S. E. Rep. 1044; *ante*, § 379.

⁵ New York, etc. Tel. Co. v. Dryburg, 35 Pa. St. 298; s. c., 78 Am. Dec. 338.

soned that the right of action may be rested upon the view that the company has undertaken as his agent, and that this view is not necessarily displaced by considering that the company is also the agent of the sender; for it may well be the agent of both parties. But the conclusion has also been rested upon the view that such a mistake is a case of *misfeasance*,¹ in which case an agent is responsible not only to his employer, but also to a third party injured thereby.²

§ 429. *Illustration of this View.*—On this principle, a telegraph company was liable to the receiver for the negligence of its operator in consenting to send a dispatch in the name of, and purporting to come from the *cashier* of a bank, dating it at another station, at the request of a person known to the operator not to be such cashier, who presented no evidence of authority to use the cashier's name, which message, addressed to a banking-house, held out such person as entitled to credit for a large amount.³ So, also, if the agent of a telegraph company at one of its stations, with power to delegate his authority, employs another person to transmit and receive messages, and such other person sends a *false message*,

¹ The general rule on this subject was laid down by Lord Holt in *Lane v. Cotton*, 12 Mod. 488, in these words: "A servant or deputy as such cannot be charged for neglect, but the principal only shall be charged for it; but for a *misfeasance*, an action will lie against a servant or deputy, but not as a deputy or servant, but as a wrong-doer." s. c., 1 Ld. Raym. 646. See also 2 Thomp. Neg. 1060.

² *New York, etc. Tel. Co. v. Dryburg*, 35 Pa. St. 298; s. c., 78 Am. Dec. 338. It has been held that one to whom a *prepaid* message is sent can maintain an action against the telegraph company for damages occasioned by the negligent omission of a word. *Wolfskehl v. Western Union Tel. Co.*, 46 Hun (N. Y.), 542. But doubtless the right of action does not depend on prepayment, but on the assumption of the duty for reward.

³ *Elwood v. Western Union Tel. Co.*, 45 N. Y. 549.

purporting to come from the cashier of a bank, directing another bank to pay a fictitious person a sum of money, and the sender then personates the fictitious person and obtains the money, without any negligence on the part of the bank, the telegraph company will be responsible to the bank thus receiving and acting upon the message.¹ So, where a person who wished to order some oysters of "P. Ellsworth," being unable to recall the name, directed a telegraphic message to "P. Elsey." On receipt at the office of delivery, the message read, "H. Elsey," and the clerk, finding no H. Elsey in the city directory, delivered the message to John Elsey, who delivered the oysters; but the sender of the message refused to accept them, on the ground that his order was intended for P. Ellsworth. The court held that the telegraph company were liable to the receiver of the message for the value of the oysters, which had spoiled, and for transportation.²

§ 430. **When the Addressee must Sue in Tort.**—Where the addressee does not sustain toward the sender the relation of a principal to his agent, he cannot maintain *assumpsit* or other action of *contract*, but his remedy is in *tort*,—at least, it seems, in jurisdictions where the distinction is kept up between forms of action. And this is especially true where his action is grounded upon the negligence of the defendant in altering the message, whereby he has been damaged,—the theory of such an action being, as already seen, *misfeasance*.³

¹ *Bank of California v. Western Union Tel. Co.*, 52 Cal. 280; s. c., 5 Cent. L. J. 265.

² *Elsey v. Postal Tel. Co.*, 3 N. Y. Supp. 117.

³ *Western Union Tel. Co. v. Dubois*, 128 Ill. 248; s. c., 21 N. E. Rep. 4; 15 Am. St. Rep. 109. It should be noted that the English theory in

§ 431. **Where Sender is Agent of a Third Person, Principal may Sue.**—If the sender is merely acting as the agent or servant of another, the right of action is in the principal or master. Thus, where one person has sent a message to another in a letter, requesting him to dispatch it as soon as possible by telegraph, charging the expense to his account, the former is the proper party to sue for damages for a failure to send the dispatch properly.¹

§ 432. **Although He be an Undisclosed Principal.**—Where the dispatch is sent by an agent for an undisclosed principal, the principal may maintain the action in his own name; and the fact that the company had no knowledge that the plaintiff was, in fact, the principal and the party tendering the message his agent, is immaterial, except in so far as it may let the company in to any defense against the plaintiff which it would have against the agent if the suit were brought by him.²

§ 433. **So, Where Sender is the Agent of the Addressee.**—This rule equally applies where, as in the preceding paragraph, the message is sent by the agent for the principal to a third person, or where

regard to privity of contract seems to be, partly at least, in vogue in that State,—as shown by its decisions in actions against carriers.

¹ *De Rutte v. New York, etc. Tel. Co.*, 1 *Daly* (N. Y.), 547; s. c., 30 *How. Pr.* (N. Y.) 403.

² *Harkness v. Western Union Tel. Co.*, 73 *Iowa*, 190; s. c., 5 *Am. St. Rep.* 672. The governing principle is, that an undisclosed principal, as the "ultimate party in interest, is entitled, against third persons, to all advantages and benefits of such acts and contracts of his agent, and consequently that he may sue in his own name on such contracts." *Story Agency*, § 418; *National Life Ins. Co. v. Allen*, 116 *Mass.* 398; *Gage v. Stimson*, 26 *Minn.* 64. See also *Ruiz v. Norton*, 4 *Cal.* 355; s. c., 60 *Am. Dec.* 618; *Coleman v. Elmira Nat. Bank*, 53 *N. Y.* 368; *Briggs v. Partridge*, 64 *N. Y.* 357; *Ford v. Williams*, 21 *How. (U. S.)* 268; *Dykens v. Townsend*, 24 *N. Y.* 57.

it is sent by the agent to the principal himself. It is obvious that where the sender of the telegram is acting as the agent of the person addressed, and is conveying information to his principal, and where the damages arising from the wrongful transmission, delay or non-delivery of the dispatch accrue to the principal and not to the agent, the right of action, on any theory, is in the principal. Here, there is a privity of contract between the principal and the telegraph company through the agent of the former, such as exists in many cases between one person and the undisclosed principal of another person who acts as agent. Accordingly, it was said in New York: "It does not necessarily follow that the contract is made with the person by whom, or in whose name the message is sent. He may have no interest in the subject-matter of the message, but the party to whom it is addressed may be the only one interested in its correct or diligent transmission; and where that is the case, he is the one in reality with whom the contract is made. * * *

It forms no part of their business to inquire who is interested in, or who is to be benefited by the intelligence conveyed. That becomes material only where there has been a delay or a mistake in the transmission of a message, which has been productive of injury or damage to the person by whom, or for whom they were employed, and to that person they are responsible, whether he was the one who sent, or the one who was to receive the message."¹

¹ *De Rutte v. New York, etc. Tel. Co.*, 30 How. Pr. (N. Y.) 403. Compare *Rose v. United States Tel. Co.*, 3 Abb. Pr. (N. S.) (N. Y.) 408; s. c., 6 Rob. (N. Y.) 305. In this case, the court decided against the right of action in the person to whom the message was addressed, but conceded in their opinion "that, irrespective of a liability arising

Thus, where the plaintiff had made an arrangement with his agent in Paris to obtain information upon business in which the plaintiff was solely interested, and transmitted it by telegraph to New York to the address of "Mentor," but the dispatch was not delivered by the company to the plaintiff,—it was held that he might maintain an action for the resulting damages.¹

purely on contract, a telegraph company may be responsible to a third person for the injurious consequences of an error in transcribing and transmitting a telegraphic message to such third person. If, upon the faith of a message thus communicated, the receiver enters into contracts or makes engagements which result in loss to himself, which loss is wholly occasioned by errors in the message, as transcribed and sent, and which errors were negligently made by the telegraph company, it would seem that a liability should attach, not on the ground of a violation of the contract, but of the violation of a duty, the faithful discharge of which the company had undertaken." In the following cases it was held that the company was liable to the person to whom the message was addressed for damages for its negligence: *Harris v. Western Union Tel. Co.*, 9 Phila. (Pa.) 88; *De La Grange v. Southwestern Tel. Co.*, 25 La. An. 383; *Aiken v. Telegraph Co.*, 5 S. C. 358; *Elwood v. Western Union Tel. Co.*, 45 N. Y. 549; s. c., 6 Am. Rep. 140 (case of money paid in consequence of a fraudulent message); *May v. Western Union Tel. Co.*, 112 Mass. 90; *De Rutte v. New York, etc. Tel. Co.*, 30 How. Pr. (N. Y.) 403. In the Province of Quebec a telegraph company is, by the Code, responsible to the receiver of a telegram for damages caused to him by a negligent error in the transmission of an unrepeatable message, even where the sender writes it on a blank on which is printed a condition that the company will not be responsible for mistakes in the transmission of unrepeatable messages. *Watson v. Montreal Tel. Co.*, 5 Mont. Leg. News, 87. In *Bell v. Dominion Tel. Co.*, 3 Mont. Leg. News, 406, the action was by the person to whom the message was addressed, and the company was held liable, the court following the American doctrine. See also *Delaporte v. Madden*, 17 L. Can. Jur. 29, which was the case of a letter instead of a telegram, where the English cases are reviewed.

¹ *Milliken v. Western Union Tel. Co.*, 110 N. Y. 403; s. c., 18 N. E. Rep. 251; 1 L. R. A. 281; 27 Cent. L. J. 577. See also *De Rutte v. New York, etc. Tel. Co.*, 1 Daly (N. Y.), 547; s. c., 30 How. Pr. (N. Y.) 403; *Leonard v. New York, etc. Tel. Co.*, 41 N. Y. 544; *New York, etc. Tel. Co. v. Dryburg*, 35 Pa. St. 300; *Baldwin v. United States Tel. Co.*, 1 Lons. (N. Y.) 128.

§ 434. **Broker Transmitting Message for Principal and Suing in his own Name.**—An agent may sue in his own name on contracts made in his name in which he is interested, as for commissions, or by reason of a special property in the subject-matter. Among such agents are factors, brokers, carriers, auctioneers, a policy broker whose name is on the policy, or an agent who, in his own name, carries on a business for his principal, and appears to be proprietor, and sells goods in the trade as such apparent owner.¹ In like manner, it has been held

¹ *Joseph v. Knox*, 3 Camp. 320; *Gardiner v. Davis*, 2 Carr. & P. 49; *Dancer v. Hasting*, 4 Bing. 2. Where A., for his own account and risk, carried on trade in the name of B., it was held that an action for goods sold in the course of such trade was properly brought in the name of B. *Alsop v. Caines*, 10 Johns. (N. Y.) 396. So, an agent may sue in his own name on a promissory note given to him as such for the benefit of his principal, when the promise is made to the agent *eo nomine*, as where a note was made payable to "William A. Mercer, agent for Maria Walker, executrix of John Walker, deceased." *Goodman v. Walker*, 30 Ala. 482; s. c., 68 Am. Dec. 134. On the other hand, except in the case of commercial paper, an undisclosed principal may sue or be sued on a contract not under seal made by or with his agent. *Ilseley v. Merriam*, 7 Cush. (Mass.) 242; s. c., 54 Am. Dec. 721; *Earle v. De Witt*, 6 Allen (Mass.), 520, 531; *Pitts v. Mower*, 18 Me. 361; s. c., 36 Am. Dec. 727; *Tutt v. Brown*, 5 Litt. (Ky.) 1; s. c., 15 Am. Dec. 33; *Violet v. Powell*, 10 B. Mon. 347; s. c., 52 Am. Dec. 548; *Ruiz v. Norton*, 4 Cal. 355; s. c., 60 Am. Dec. 618; *St. Louis, etc. R. Co. v. Thatcher*, 13 Kan. 567; *Chandler v. Coe*, 54 N. H. 561; *Crosby v. Watkins*, 12 Cal. 88; *Lerned v. Johns*, 9 Allen (Mass.), 421; *Hunter v. Giddings*, 97 Mass. 41; *Byington v. Simpson*, 134 Mass. 169; *Beckham v. Drake*, 9 Mees. & W. 79, 92, per Lord Abinger. See also *Anderton v. Shoupe*, 17 Ohio St. 128; *Taintor v. Prendergast*, 3 Hill (N. Y.), 72; s. c., 38 Am. Dec. 618; *Gilpin v. Howell*, 5 Pa. St. 41; s. c., 45 Am. Dec. 720. So, a principal, foreign or domestic, may sue for the price of goods sold by his factor, unless it is made affirmatively to appear that the credit was given exclusively to the agent. *Barry v. Page*, 10 Gray (Mass.), 398. Thus, where a broker or agent purchases goods without disclosing his principal, the principal, when discovered, is nevertheless liable for the price, and may also sue on a warranty in the contract. *Beebee v. Robert*, 12 Wend. (N. Y.) 413; s. c., 27 Am. Dec. 132. But the action is subject to any set-off or advance which existed against the agent before the principal was disclosed (*Tutt v. Brown*, 5 Litt. (Ky.) 1; s. c.,

that a broker may sue a telegraph company in his own name, for a breach of a contract to transmit an order in his name, on behalf of his principal, for the purchase of goods. In such case, however, he

15 Am. Dec. 33; *Judson v. Stillwell*, 26 How. Pr. (N. Y.) 513; *Ruiz v. Norton*, 4 Cal. 355; s. c., 60 Am. Dec. 618), provided there were no circumstances calculated to notify the party that he was dealing with an agent. *Bassett v. Lederer*, 8 N. Y. Supreme Ct. 676; s. c., 1 Hun (N. Y.), 274. In order to maintain an action where the action is by an undisclosed principal, he must prove the agency and the power of the agent to bind him at the time of making the contract. *Ruiz v. Norton*, *supra*. Accordingly, a note made to a town treasurer by name, or to his successors in his office, may be sued upon by the town. *Arlington v. Hynds*, 1 D. Chp. (Vt.) 431; s. c., 12 Am. Dec. 704. And parol evidence to show the town of which the nominal payee in such a note was treasurer is admissible, if the note does not show that fact. *Ibid*. So, where a note was endorsed to one as "cashier," it was held that the right of action was in the bank of which he was cashier. *Farmers', etc. Bank v. Day*, 13 Vt. 36; *Bank of Manchester v. Slason*, *Id.* 334. So, where a note was made to certain persons as "commissioners of the Vermont Central Railroad Company," and was afterwards delivered to the company on its organization, it was held that the company could sue on the note. *Vermont Central R. Co. v. Claves*, 21 Vt. 30. See also *Warden v. Burnham*, 8 Vt. 390. So, on a sale of goods on credit by a licensed auctioneer, where the vendee refuses to take them, the owner may bring an action for damages, in his own name, before the expiration of the term of credit, though he cannot sue for the price till the credit expires. *Girard v. Taggart*, 5 Serg. & R. (Pa.) 19; s. c., 9 Am. Dec. 327; recognized and followed in *Hubbert v. Borden*, 6 Whart. (Pa.) 79, 95. The law on this subject is stated by Chancellor Kent on the authority of *Girard v. Taggart*, *supra*, as follows: "Though payment to a factor for goods sold by him be valid, the principal may control the collection, and sue for the price in his own name, or for damages for non-performance of the contract; and it is immaterial whether the agent was an auctioneer or common factor." 2 Kent. Com. 624. The reason which allows the undisclosed principal to sue is that he is liable, when discovered, on the contract made by his agent. As he is answerable on the contract on the one hand, he has a corresponding right to make the other contracting party answer to him. That an undisclosed principal is liable, when discovered, on a contract made by his agent, and that he can maintain an action on such contract, is recognized in *Jones v. Ætna Insurance Co.*, 14 Conn. 501, 508; *Dykers v. Townsend*, 24 N. Y. 57, 61; *McKay v. Draper*, 27 N. Y. 256, 264; *Union Rubber Co. v. Tomlinson*, 1 E. D. Sm. (N. Y.) 364, 379; *Ferguson v. Hamilton*, 35 Barb. (N. Y.) 427, 442; *McMonnies v. Mackay*, 39 Barb. (N. Y.) 561, 565; *Inglehart v. Thousand Island Hotel*,

recovers as *trustee* for his principal.¹ Under the remedial system which exists in Alabama, where the old common law system, with statutory modifications is understood to prevail, with a separate court of chancery, where the message was sent by a broker to his principal, the action is properly brought in the name of the *broker to the use of the principal*.²

7 Hun (N. Y.), 549; New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. (U. S.) 344, 381; Elkins v. Boston, etc. R. Co., 19 N. H. 337, 342; Coleman v. First Nat. Bank, 53 N. Y. 388, 394. It has been ruled in New York that the suit should be brought in the name of the principal and not in the name of the agent, where, on the face of the contract, it purports to have been made by or with an agent having no direct or beneficial interest in the transaction, as in the case of a bond made to the plaintiffs by the name and description of the "directors of the Onondaga County Mutual Insurance Company." Bayley v. Onondaga County Mut. Ins. Co., 6 Hill (N. Y.) 476; s. c., 41 Am. Dec. 759. The rule seems to be that, although the agent's name appears in the contract, yet, if it is accompanied by such designation of the official or representative character in which he is named as promisee that the promise is, in judgment of law, taken to be to his principal and not to himself, then, in such case, the contract cannot be said to be made in the name of the agent. Considerant v. Brisbane, 2 Bosw. (N. Y.) 471, 479; s. c., 22 N. Y. 400. The rule that an undisclosed principal may sue on the contract of his agent does not apply in the case of *negotiable paper*: here the right of action is restrained to the parties to the instrument. Williams v. Robbins, 16 Gray (Mass.), 77. On the other hand, a principal is not liable on a bill of exchange drawn by an agent in his own name, although it contains a direction to the drawee to charge the amount to the account of the principal. Bank of British North America v. Hooper, 5 Gray (Mass.), 567; s. c., 66 Am. Dec. 390; Emly v. Lye, 15 East, 7; Pentz v. Stanton, 10 Wend. (N. Y.) 271, 276; s. c., 25 Am. Dec. 558; Stackpole v. Arnold, 11 Mass. 27; s. c., 6 Am. Dec. 150; Bedford Commercial Ins. Co. v. Covell, 8 Metc. (Mass.) 442; Taber v. Cannon, *Id.* 456, 460. See also Bass v. O'Brien, 12 Gray (Mass.), 477, 481; Williams v. Robbins, 16 Gray (Mass.), 77; Slawson v. Loring, 5 Allen (Mass.), 342; Barlow v. Congregational Society, 8 Allen (Mass.), 461; Tucker Manf. Co. v. Fairbanks, 98 Mass. 101, 104; Bartlett v. Tucker, 104 Mass. 336, 339; Anderton v. Shoupe, 17 Ohio St. 125, 128. Compare Carpenter v. Farnsworth, 106 Mass. 561; Chandler v. Coe, 54 N. H. 561, 567.

¹ United States Tel. Co. v. Gildersleve, 29 Md. 332; s. c., 96 Am. Dec. 519.

² American Union Tel. Co. v. Daughtery, 89 Ala. 191; s. c., *sub. nom.* American Union Tel. Co. v. Daughtery, 7 South. Rep. 660.

§ 435. **Stranger to Both Sender and Addressee.**—Under any theory which prevails upon this subject, it may be assumed that an entire stranger, who does not sustain towards either the sender or addressee the relation of a principal to his agent, cannot maintain the action; because there is neither any privity of contract as to him, nor is he in the contemplation of both parties to the transaction which takes place when the dispatch is sent. Suppose, for instance, that a merchant has a customer for whom he wants an article, which he himself does not have, and telegraphs to a correspondent for it, and, in consequence of the non-delivery or misdelivery of the message, fails to get it, the damages which his customer has thereby sustained can be sued for by neither party, unless he acted as the customer's agent in the transaction.¹

§ 436. **Importance of the Defendant having Notice of the Agency.**—But, in view of the principle already discussed,² of the right of action of an undisclosed principal, on contracts made for him by his agent, it would seem to be a misapplication of the rule in *Hadley v. Baxendale*,³ to conclude that, where the message is sent for the benefit of another person for whom the sender of the message acts as agent, this fact must be brought home to the company, in order to charge them with liability for the damages which he sustains through the non-delivery of the message, on the theory that, without such notice, his rights are not in the contemplation

¹ See, in illustration of this, *Deslottes v. Baltimore, etc. Tel. Co.* 40 La. An. 183; s. c., 21 Am. & Eng. Corp. Cas. 158; 3 South. Rep. 566; 3 Rail. & Corp. L. J. 342.

² *Ante*, § 432.

³ *Ante*, § 311.

of both parties to the contract within the meaning of that rule. For, as already seen,¹ it is sufficient to meet the rule of *Hadley v. Baxendale*, that the company have *general notice* of the importance of the dispatch, without notice of particulars. We, however, find a case seemingly ignoring this, presenting the following facts: The plaintiffs were engaged in operating a saw-mill. The saw in their mill having broken, they engaged S., of the firm of G. & S., to order them a new one from St. Louis by telegram. S. addressed a dispatch in his firm's name to a hardware company in St. Louis, directing them to ship a saw at once to the plaintiffs, and delivered it to a traveling salesman of that company, with the money to pay the charges, and went with him to the telegraph office. The salesman wrote another dispatch signed by himself, ordering the saw to be sent to G. & S. Neither dispatch was delivered. The message did not show that it was for the plaintiff's benefit, and the agent of the telegraph company had no knowledge of that fact. It was held that the plaintiffs had no right of action against the company, either for the money paid for the transmission of the message, or for damages by reason of their mill being idle for want of a saw.² But where the telegram was sent by a third person in the *plaintiff's presence*, and the plaintiff paid the charges, and the operator knew its importance, the question whether the defendant had notice of the agency was deemed immaterial: knowledge of the fact would

¹ *Ante*, § 386.

² *Elliott v. Western Union Tel. Co.*, 75 Tex. 18; s. c., 12 S. W. Rep. 954.

not have influenced the conduct of the defendant's agents.¹ In short, the theory in Texas is, that a telegraph company having knowledge of the urgency of a message, is liable in damages for negligence in its transmission and delivery, although it was prepared, delivered, and paid for by another, acting for the one for whose benefit it was sent, at his special request, and not by the former in person;² and this is obviously a sound view.

§ 437. **Action over by Sender for Damages Sustained by Receiver and Recovered from the Company.**—It has been ruled that the sender of a telegraphic dispatch cannot recover of the company the damages sustained by the receiver of it, although the sender has been obliged, by the judgment of a court of another State, to pay the damages sustained by such receiver, in consequence of the wording of the dispatch being changed in transmission.³ On the contrary, another court has held that, as between the sender and receiver of a message by telegraph, any loss occasioned by a change of the terms of the message during transmission must fall upon the party who elected that means of communication for that message. Such party has his remedy over against the telegraph company, in case the error resulted from its negligence.⁴ The theory of the last case is that the sender makes the telegraph company his agent to convey the communication, and thus becomes responsible to the receiver for any

¹ *Western Union Tel. Co. v. Broesche*, 72 Tex. 654; s. c., 10 S. W. Rep. 734.

² *Loper v. Western Union Tel. Co.*, 70 Tex. 689; s. c., 8 S. W. Rep. 600.

³ *Pegram v. Western Union Tel. Co.*, 100 N. C. 28.

⁴ *Ayer v. Western Union Tel. Co.*, 79 Me. 493.

mistake therein. But cases may exist where the receiver, and not the sender, may choose the mode of communication,—as where the receiver asks a question by telegraph and the sender answers it by the same agency. In this case it would be both unreasonable and unjust to allow the receiver to visit the consequences of the negligence of the company upon the sender.

§ 438. **Under Indiana Statutes Giving Penalties.**—The action for the *penalty* given by the former statute of Indiana, elsewhere quoted,¹ is only maintainable by the sender of the message.² And the plaintiff must show that he was the sender. And he does not do this by showing merely that he delivered a message to the company, signed by another and paid for by himself.³ The statute of the same State, of 1885,⁴ prescribing the duties of telegraph companies and fixing the penalty for the violation of any of its provisions, to be recovered by “any party aggrieved,” has not changed this rule.⁵

§ 439. **Under Indiana Statute Giving Special Damages.**—But under the statute of 1881, of that State,⁶ providing that telegraph companies shall be liable for *special damages* occasioned by failure or negligence of their operators in receiving or transmitting dispatches, a different rule prevails: here an ad-

¹ *Ante*, § 159, note.

² *Western Union Tel. Co. v. Pendleton*, 95 Ind. 12; s. c., 48 Am. Rep. 692; *Western Union Tel. Co. v. Meek*, 49 Ind. 53; *Western Union Tel. Co. v. Hopkins*, *Id.* 223; *Western Union Tel. Co. v. Kinney*, 106 Ind. 468.

³ *Western Union Tel. Co. v. Brown*, 108 Ind. 538.

⁴ *Ante*, § 159.

⁵ *Hadley v. Western Union Tel. Co.*, 115 Ind. 191; s. c., 21 Am. & Eng. Corp. Cas. 72; 15 N. E. Rep. 845; 13 West. Rep. 405.

⁶ *Rev. Stat. Ind.* § 4177.

dressee may recover, although no relation of contract exists between him and the company.¹

§ 440. **Under Missouri Statute Giving Special Damages.**—Under the Missouri statute,² which provides that “every telephone or telegraph company now organized, or which may be hereafter organized under the laws of this State, shall be liable for special damages occasioned by the failure or negligence of their operators or servants in receiving, copying, transmitting, or delivering dispatches,” the addressee may maintain the action.³

§ 441. **Under Mississippi Statute Giving Penalty.**—The Mississippi Act of March 18, 1886,⁴ providing that any telegraph company failing to transmit and deliver, within a reasonable time, any message, shall pay \$25 in addition to other damages to the person injured, is construed as giving the right to recover the penalty to one to whom the message is addressed, although he paid nothing for its transmission, and sustained no pecuniary injury.⁵

§ 442. **In Case of Refusal of Connecting Line to Forward.**—Where an action is given by statute for neglecting or refusing to transmit a dispatch by telegraph, it has been held that if a telegraph company desires another company to receive and forward a message which has come over its line, the

¹ *Western Union Tel. Co. v. McKibben*, 114 Ind. 511; s. c., 14 N. E. Rep. 894; *Hadley v. Western Union Tel. Co.*, 115 Ind. 191.

² Mo. Rev. Stat. 1879, § 887; *Id.* 1889, § 2729.

³ *Markel v. Western Union Tel. Co.*, 19 Mo. App. 80. The Missouri statute is very similar to that in Indiana referred to in the [preceding section]; and the Missouri court adopted the construction placed by the Supreme Court of Indiana upon their statute.

⁴ Miss. Acts 1886, p. 91.

⁵ *Western Union Tel. Co. v. Allen*, 66 Miss. 549; s. c., 6 South. Rep. 461

company so desiring the telegram to be sent is the proper party to sue for the penalty in case of refusal; and this, notwithstanding the blank upon which the sender wrote the telegram contains a printed heading of the terms and conditions on which the company receive telegrams to be transmitted, stipulating that it will not "be held liable for any errors or neglect by any other company over whose lines this message may be sent to reach its destination, and this company is hereby made the *agent* of the signer of the message, to forward it over the lines of other companies when necessary."¹

§ 443. **Husband Suing for Wife: Texas Code.**—Under the Texas Code of Civil Procedure, an action for damages may be maintained by a *husband alone*, for the negligent failure of a telegraph company to transmit and deliver a message to his wife.² He may sue, irrespective of the questions of agency and payment; and the fact that the company had no *notice* that she was plaintiff's wife, or that the contract was made for her, is immaterial.³ He is the proper party to sue for failure to deliver a message summoning a physician to attend his wife, and she is not a necessary party.⁴

¹ United States Tel. Co. v. Western Union Tel. Co., 56 Barb. (N. Y.) 46. But this action may properly be maintained by the sender of the dispatch in such cases. Baldwin v. United States Tel. Co., 54 Barb. (N. Y.) 505; Thurn v. Alta California Tel. Co., 15 Cal. 472; Leonard v. New York, etc. Tel. Co., 41 N. Y. 544; Squire v. Western Union Tel. Co., 98 Mass. 232.

² Loper v. Western Union Tel. Co., 70 Tex. 689; s. c., 8 S. W. Rep. 600.

³ Western Union Tel. Co. v. Adams, 75 Tex. 531; s. c., 12 S. W. Rep. 857; 6 L. A. R. 844.

⁴ Western Union Tel. Co. v. Cooper, 71 Tex. 507; s. c., 9 S. W. Rep. 598.

CHAPTER XIV.

MATTERS OF PROCEDURE AND EVIDENCE.

Article I. PLEADING.

Article II. EVIDENCE.

Article III. OTHER MATTERS.

ARTICLE I.—PLEADING.

SECTION.

448. Form of Action: Contract or Tort.

449. What the Plaintiff must Aver and Prove.

450. Under the Indiana Statute Giving a Penalty.

451. Examples of Good Declarations or Complaints.

452. Another Example.

453. Example of a Petition Bad because Damages too Remote.

454. Uniting Claim for Statutory Penalty with Claim for Damages.

455. *Allegata et Probata*: Variance.

§ 448. **Form of Action: Contract or Tort.**—In jurisdictions where the forms of actions are so far kept up that a distinction is made between actions of contract and actions of tort, if the action is brought by the *receiver* of the message, it must be in *tort*, since there is no contract relation between him and the sender.¹ But this rule would not apply where the sender of the message acted merely as the *agent* of the receiver.²

¹ *Western Union Tel. Co. v. Du Bois*, 128 Ill. 248; s. c., 21 N. E. Rep. 4.

² *Ante*, § 425.

§ 449. **What the Plaintiff must Aver and Prove.**—It has been ruled that, in an action against a telegraph company for damages for failing to transmit a message, the plaintiff must aver in his complaint and prove on the trial, that the defendant has a line of wires wholly or partly within the State; that it is engaged in telegraphing for the public, and that the particular message was placed in the hands of its agent for transmission.¹ Under the New York statute, a telegraph company is required to transmit dispatches on payment of charges. Hence, it is held in that State that the complaint in an action for damages for failure to deliver a message is bad on demurrer if it neither alleges *payment* nor *tender* of the charges, or facts showing a *waiver*, or a special contract.² So, in Indiana, the complaint must aver that the sender paid or tendered the usual charges.³ In Texas the petition should allege whether *exemplary* or *actual* damages are claimed.⁴

§ 450. **Under the Indiana Statute Giving a Penalty.**—Two successive statutes have existed in Indiana allowing the recovery of the sum of \$100 for the violation by telegraph companies of the duties prescribed by the statute.⁵ These statutes have always been construed by the Supreme Court of that State as giving a penalty, and not as giving merely liquidated damages.⁶ It is a familiar rule

¹ *Western Union Tel. Co. v. Ferguson*, 57 Ind. 495.

² *Macpherson v. Western Union Tel. Co.*, 52 N. Y. Super. 232.

³ *Western Union Tel. Co. v. Mossler*, 95 Ind. 29.

⁴ *McAllen v. Western Union Tel. Co.*, 70 Tex. 243; s. c., 7 S. W. Rep. 715.

⁵ *Ante*, § 159.

⁶ *Western Union Tel. Co. v. Axtell*, 69 Ind. 199; *Western Union Tel. Co. v. Mossler*, 95 Ind. 29; *Western Union Tel. Co. v. Kinney*, 106 Ind. 468; *Western Union Tel. Co. v. Harding*, 103 Ind. 505; *Western Union*

that a party bringing an action upon a penal statute must bring himself strictly within the terms of the statute: it is at once strictly *construed* and *pursued*. In keeping with this rule, we find that it has been held in that State, that, in an action under the statute of 1885,¹ for failure to transmit and deliver a message with impartiality, and without discrimination, the *complaint must allege* that the person to whom the message was addressed resided *within one mile of the station, or within the city or town wherein the same is situated*.² So, in an action under the same statute, to recover the penalty given for failing to transmit a telegram, where the plaintiff alleges that the contract was made on *Sunday*, he must plead facts showing a reasonable *necessity* for making the contract on that day, and that defendant *knew* of this necessity.³

§ 451. **Examples of Good Declarations or Complaints.**—In an action for damages for *delay* in delivering a telegram, a declaration alleging that, if the message had been promptly delivered, plaintiff *would have obtained* the purchase of a lot worth \$5,000, which was offered for sale for \$3,000, and that by the delay they lost the purchase, and were damaged the difference between the price at which the lot was offered to them and its market value when the message should have been delivered, was

Tel. Co. v. Steele, 108 Ind. 163; Western Union Tel. Co. v. Wilson, 108 Ind. 308; Western Union Tel. Co. v. Brown, 108 Ind. 536.

¹ Acts Ind. 1885, p. 151.

² Reese v. Western Union Tel. Co., 123 Ind. 294; s. c., 24 N. E. Rep. 163.

³ Western Union Tel. Co. v. Yopst, 118 Ind. 348; s. c., 3 L. R. A. 224; 20 N. E. Rep. 222.

⁴ Compare *ante*, § 346, *et seq.*

held good on demurrer.¹ A complaint in an action against a telegraph company, alleged that the plaintiff's agent in France forwarded a cable message addressed to "Mentor, New York," which message was intended for the plaintiff; that the plaintiff called at the defendant's office and inquired if it had received the message, and was informed that it had not; that the plaintiff then stated that he was expecting a message from Paris, so addressed, and requested the defendant to deliver it to him at his residence, and offered to pay such service in advance, which the defendant declined to accept, but promised to deliver such message to the plaintiff when received by it; that the defendant received such message, but neglected to deliver the same as agreed, in consequence whereof the plaintiff suffered loss, etc. It was held that this stated a good cause of action, either on the contract made by the defendant with the plaintiff's agent in Paris, or upon the agreement with the plaintiff in New York.²

§ 452. **Another Example.**—The Supreme Court of Texas has held that a petition stated a good cause of action, which alleged that the plaintiff's wife's son, who was dangerously ill at M., wrote a message dated October 2d., in the words: "Come immediately—I am very sick," which was delivered to the agent at M., at 4 P. M. of that date, for transmission; that the agent was informed of the relationship between the parties; that on that day the plaintiff and his wife were in W., within 600 yards

¹ *Alexander v. Western Union Tel. Co.*, 67 Miss. 386; s. c., 5 South. Rep. 397.

² *Milliken v. Western Union Tel. Co.*, 110 N. Y. 403; s. c., 1 L. R. A. 281; 18 N. E. Rep. 251; 18 N. Y. St. Rep. 328 (reversing s. c., 53 N. Y. Super. 111.)

of the defendant's office, as was well known by the agent at that place; that the message could have been delivered within half an hour from its receipt at M.; that, if it had been so delivered, the plaintiff's wife could, by the usual course of travel, have reached her son before his death, on the third; that, by the negligence of the defendant, the message was not delivered until 6 P. M. on the third; that she took the next train for M., but learned, at an intermediate point, that her son was dead, and that the body had been sent to E. for burial; that she started at once for E., but was unable to reach there until after the body had been interred; that she suffered great *hardship*, in being compelled to travel on a freight train a part of the way, and great *mental anguish* by not being with her son in his last moments, etc. The court reasoned that, although the allegations in regard to the death and burial of the son may have been insufficient if *specially excepted* to, yet it appearing by reasonable intentment that he died about noon of October 3d, and had been buried when his mother arrived, they must be treated as sufficient on *general demurrer*.¹

§ 453. **Example of a Petition Bad Because Damages too Remote.**—But where the plaintiff, after alleging in his petition that he delivered to the defendant company for transmission a message as follows: "R. [addressed] Meet me in C. Saturday night. S.," which was not delivered to R., and further alleging that, by its negligence, he was put to expense in hiring a conveyance to go from C. to R.'s home and back again; that by loss of time he

¹ *Loper v. Western Union Tel. Co.*, 70 Tex. 689; s. c., 8 S. W. Rep. 600. As to damages grounded on mental anguish, see *ante*, § 378 *et seq.*

failed to meet important engagements; and that, by reason of exposure, his health was greatly impaired, the petition was held *bad on demurrer*, the *damages* being *too remote*, conjectural, and not in contemplation of the parties, in case of a breach of the contract.¹

§ 454. **Uniting Claim for Statutory Penalty with Claim for Damages.**—A declaration is not *bad on general demurrer* by reason of the fact that the pleader unites in one of the counts a claim for the statutory penalty, which claim is not actionable, because the telegraph is an interstate line;² though, no doubt, it could be reached by a special demurrer, or, under some systems, by a motion to strike out.

§ 455. **Allegata et Probata: Variance.**—The *allegata* and the *probata* must, of course, correspond as to essential matters;³ but this rule does not extend to *dates*, provided the date proved is within the statute of limitations, unless there are special circumstances making the date material. Thus, where a complaint to recover the statutory penalty for failure to transmit a telegram alleged that it was sent in *March*, it was held that it could be shown to have been sent in *January*.⁴

¹ *Western Union Tel. Co. v. Smith*, 76 Tex. 253; s. c., 13 S. W. Rep. 169. See *ante*, § 318 *et seq.*

² *Alexander v. Western Union Tel. Co.*, 67 Miss. 386; s. c., 5 South. Rep. 397.

³ *Western Union Tel. Co. v. Kilpatrick*, 97 Ind. 42.

ARTICLE II.—EVIDENCE.

SECTION.

- 458. Declarations of the Company's Agents.
- 459. Correspondence between Telegraph Operators.
- 460. Evidence on the Question of Damages.
- 461. Other Points of Evidence.
- 462. Evidence of Claim of Indemnity duly Made of Company.
- 463. Parol Evidence of Contents of Such Claim.
- 464. When Copy of Message Admissible in Evidence.
- 465. Judicial Notice not Taken of Telegraph Lines.
- 466. Secondary Evidence of the Contents of the Telegram.

§ 458. **Declarations of the Company's Agents.**—
The *subsequent declarations* of the company's agents, not connected with the sending of the message, are incompetent evidence to charge the company in an action against it, the same not being part of the *res gestæ*, but in the nature of historical narratives.¹ Thus, the statements of such an agent are not competent, as against the company, to prove that a message was not transmitted, when not made in performance of any duty relating to its transmission.²

§ 459. **Correspondence Between Telegraph Operators.**—The same principle obviously applies so

¹ Grinnell v. Western Union Tel. Co., 113 Mass. 299, 307; McAndrew v. Electric Tel. Co., 17 C. B. 3; United States Tel. Co. v. Gildersleve, 29 Md. 232; Sweetland v. Illinois, etc. Tel. Co., 27 Iowa, 433; Robinson v. Fitchburg, etc. R. Co., 7 Gray (Mass.), 92.

² Western Union Tel. Co. v. Way, 83 Ala. 542; s. c., 4 South. Rep. 844.

as to exclude the declarations of the company's agents made *to each other*, even *dum fervet opus*, when offered to prove extrinsic facts capable of being proved by the testimony of witnesses under oath. Thus, in an action for the failure of a telegraph company to deliver a message, the *correspondence* between telegraph operators of the defendant is not admissible to prove any direct fact, except the fact that such correspondence took place, if that should become material. Accordingly, such correspondence is not admissible to prove that the addressee of the message was gone to the country at the time when the message was received by the delivering office, so that it could not be delivered to him.¹

§ 460. **Evidence on the Question of Damages.**—The plaintiff must, of course, prove *damages*, or he cannot recover anything for the mistake or default other than nominal damages, or the cost of sending the message. Where the default consisted in delay in delivering the message, and there was no evidence tending to show that matters would have been different if the message had been promptly delivered, or that any loss was caused by the delay, it was held error to submit the question of the defendant's liability to the jury.² On the other hand, where the action is for a *statutory penalty*, it is not necessary for the plaintiff to prove any damages in order to recover,³ and this, irrespective of the question

¹ *Western Union Tel. Co. v. Cooper*, 71 Tex. 507; s. c., 10 Am. St. Rep. 772; 9 S. W. Rep. 598.

² *Cutts v. Western Union Tel. Co.*, 71 Wis. 46; s. c., 36 N. W. Rep. 627.

³ *Western Union Tel. Co. v. Bucharan*, 35 Ind. 429; s. c., 9 Am. Rep. 744.

whether the statute is regarded as giving a penalty or liquidated damages. In a jurisdiction where *mental suffering* has been held an element of damages in an action against a telegraph company for a default in failing to deliver a message, a well-known rule has been applied so as to admit evidence of the *utterances* or *expressions* indicative of pain or suffering caused by such failure.¹ In such an action, the *opinion* of a broker "that there was no certainty that the stock could have been purchased at the quotation prices, on the morning the telegram was received," has been held not admissible.² Evidence as to the financial condition of the telegraph company is inadmissible.³ Where the action was for failure to deliver a telegram within a reasonable time,—a message to a doctor, summoning him professionally,—evidence on behalf of the telegraph company that the doctor's charges had not been paid, and that it was not his *custom* to make such visits without prepayment, was held inadmissible.⁴

§ 461. **Other Points of Evidence.**—In an action against a telegraph company for negligence in the transmission of a message, evidence is inadmissible against the company, that, because of the alleged negligence, one of its officers made a *deduction from the pay* of one of its operators.⁵ Where the action is brought by the addressee of the message who seeks

¹ *Western Union Tel. Co. v. Henderson*, 89 Ala. 510; s. c., 7 South. Rep. 419.

² *United States Tel. Co. v. Wenger*, 55 Pa. St. 262; s. c., 93 Am. Dec. 751.

³ *Western Union Tel. Co. v. Henderson*, 89 Ala. 510; s. c., 7 South. Rep. 419.

⁴ *Western Union Tel. Co. v. Henderson*, *supra*.

⁵ *Grinnell v. Western Union Tel. Co.*, 113 Mass. 299; s. c., 18 Am. Rep. 485.

to recover damages for a mistake in transmitting it, whereby he was induced to make certain purchases which he otherwise would not have made,—he may, it has been held, show *how he understood it*, and may testify that, on the faith of his understanding of it he made the purchases.¹ But, in such an action, the declarations of the plaintiff's brokers as to the *reason* why they did not buy stock, on the receipt of a *letter* ordering its purchase, are not admissible in favor of their principal, not being a part of the *res gestæ* in regard to the contract with the telegraph company to send the message.²

§ 462. **Evidence of Claim of Indemnity duly Made of Company.**—A sender of a telegram complained to the operator of a mistake that had been made in its transmission, and was directed to the principal office of the company, where he was informed by the clerk in charge that the office manager was busy, and was requested to make his business known to the clerk, who would take the complaint down in writing. The complaint was accordingly taken down in writing, and in the presence of the sender handed to a person represented to be the attorney of the company, who said he would investigate the matter, and who subsequently wrote the sender, on a letter form of the company that his claim for compensation was rejected. It was held, in an action against the company, that there was sufficient evidence *prima facie* to establish the fact that the complaint reached the defendant; and that the persons

¹ *Alken v. Western Union Tel. Co.*, 69 Iowa, 31.

² *United States Tel. Co. v. Wenger*, 55 Pa. St. 262; s. c., 93 Am. Dec. 751. Conflicting evidence on which a jury were justified in finding that an application was made to the defendant company for the transfer of money to L., and not to S. *Western Union Tel. Co. v. Simpson*, 73 Tex. 423; s. c., 11 S. W. Rep. 385.

dealing with the sender were authorized to act and speak for it.¹

§ 463. **Parol Evidence of Contents of Such Claim.**—It has been held that, where a person, who has suffered loss by the neglect of a telegraph company to deliver a message, serves upon the agent of the company a written demand for damages, and gives the agent a copy thereof, but keeps the original, on which the agent accepts service in writing, he may prove the contents thereof by parol, where the loss of the original is shown.²

§ 464. **When Copy of Message Admissible in Evidence.**—In an action against a telegraph company for failure to deliver a message, it has been held not error to admit a copy of the message, properly identified, fourteen months after its receipt for transmission by the company, where it is first shown by the manager at the receiving office that the original is not in his office, nor under his control, and that, by the rules of the company, original messages are retained in the office where received for six months, and are then sent to Chicago and destroyed.³

§ 465. **Judicial Notice not Taken of Telegraph Lines.**—A court cannot take judicial notice of the existence or operation of the telegraph lines of a company outside of the territorial jurisdiction of the court.⁴

¹ *Bennett v. Western Union Tel. Co.*, 18 N. Y. St. Rep. 777; s. c., 2 N. Y. Supp. 365.

² *Western Union Tel. Co. v. Collins (Kan.)*, 25 Pac. Rep. 187.

³ *Western Union Tel. Co. v. Collins (Kan.)*, 25 Pac. Rep. 187.

⁴ *People v. Tierney*, 57 Hun (N. Y.), 357; s. c., 32 N. Y. St. Rep. 605; 10 N. Y. Supp. 940; *Same v. Same (Sup. Ct.)*, 32 N. Y. St. Rep. 608; s. c., 10 N. Y. Supp. 948.

§ 466. **Secondary Evidence of the Contents of the Telegram.**—As in cases of other writings, proof of the *loss* of a telegram is a necessary foundation to the admission of parol evidence of its contents.¹ It has been held that the testimony of the operator in charge of the defendant's office from which a telegram was sent, that he sent away all the papers found there shortly after the telegram was sent, and that he has been informed that they were destroyed, is not competent to show the destruction of the telegram for the purpose of admitting parol evidence of its contents.² The reason of the rule is thus stated by Mr. Justice CLOPTON, citing the authorities in the margin: "Ordinarily the declarations of the person who last had possession of a writing are not receivable as evidence of its loss if he be alive, and in the jurisdiction of the court. There are cases in which the declarations of a person to whom it was last traced, to the effect that he did not have the instrument, or to whom he had delivered it, have been received for the purpose of showing that the party had prosecuted a diligent search.³ Though, as the sufficiency of the preliminary proof is for the court, it may not be necessary to preserve the strict rule between direct and hearsay evidence, it is not so far relaxed as to admit hearsay evidence to show the fact of search, or the destruction of the writing by the declarant."⁴ It was, therefore, held not proper to allow a witness, who had been a telegraph operator of the defendant, to testify, not from

¹ Whilden v. Bank, 64 Ala. 1.

² American Union Tel. Co. v. Daughtery, 89 Ala. 191; s. C., *sub. nom.* American Union Tel. Co. v. Daughtry, 7 South. Rep. 660.

³ Reg. v. Kenilworth, 53 E. C. L. 642.

⁴ Whart. Ev. § 150.

his own knowledge, but from information received from others, that the papers of the telegraph company had been sent from Mobile to New York and sold to a paper mill, for the purpose of letting in parol evidence of the contents of a telegram.¹

¹ American Union Tel. Co. v. Daughtery, 89 Ala. 191; s. c., *sub. nom.* American Union Tel. Co. v. Daughtry, 7 South. Rep. 660.

ARTICLE III.—OTHER MATTERS.

SECTION.

469. Service of Process on Such Companies.

470. Instructions.

471. Immaterial Special Findings.

§ 469. **Service of Process on Such Companies.**—Service of summons, in an action against a telephone and telegraph company, on its general superintendent, an officer having general charge of one of its departments, is a service on a “managing agent,” within the meaning of a statute¹ providing that service of a summons upon a domestic corporation must be made by delivering a copy thereof, within the State, “to the president or other head of the corporation, * * * or a director or managing agent.”²

§ 470. **Instructions.**—Where the negligence specifically charged in the petition is *failure to find* the addressee of the message after the message has been transmitted, and the petition states that the messenger was promptly sent to the place of final delivery, the defendant is entitled to an instruction explaining to the jury that there is no question about *delay* in transmitting the message over the

¹ N. Y. Code Civ. Proc. § 431.

² Barrett v. American Telephone, etc. Co., 10 N. Y. Supp. 138.

wire.¹ A charge requiring the jury to determine the *degree of negligence*, without defining the same, has been held not ground for a reversal, in the absence of any proper assignment of error showing that a finding of gross negligence influenced the jury in fixing the amount of the damages.² Where it was shown that there was the sign of the defendant company over the door of the office where the message was received, and the operator testified that he paid over all receipts to the treasurer of said company, it was held not error to charge that the office is, *prima facie*, an office of the defendant.³

§ 471. **Immaterial Special Findings.**—In such an action, the appellate court will not reverse the judgment of the trial court because of an incorrect finding to the effect that “defendant’s telegraph line was not in good, perfect working order,” where there is other evidence of negligence.⁴

¹ *Western Union Tel. Co. v. Cooper*, 71 Tex. 507; s. c., 10 Am. St. Rep. 772.

² *Gulf, etc. R. Co. v. Miller (Tex.)*, 7 S. W. Rep. 653.

³ *Thompson v. Western Union Tel. Co.*, 107 N. C. 449; s. c., 12 S. E. Rep. 427.

⁴ *Turner v. Hawkeye Tel. Co.*, 41 Iowa, 458; s. c., 20 Am. Rep. 605, 608.

CHAPTER XV.

CONTRACTS BY TELEGRAPH.

SECTION.

- 475. Validity of Contracts by Telegraph.
- 476. Telegram a Memorandum under Statute of Frauds.
- 477. When Offer Deemed to have been Accepted.
- 478. Place of Contract: Offer in One State, Acceptance in Another.
- 479. Certainty in the Proposition and Acceptance.
- 480. View that the Company is not the Agent of the Sender.
- 481. The Same View in an American Court.
- 482. Weight of American Doctrine to the Contrary.
- 483. Ratification of Such Agency.
- 484. Rights of Sender of Message against Company in Such a Case.
- 485. Illustration: Sender must Fulfill Order as Delivered, and Seek Recourse of the Telegraph Company.
- 486. Another Illustration.
- 487. A Qualification of this Rule.

§ 475. **Validity of Contracts by Telegraph.**—It is scarcely necessary to say that a valid and binding contract may be made by telegraph.¹

§ 476. **Telegram a Memorandum under Statute of Frauds.**—A telegraphic dispatch, signed by the party to be charged or by his duly authorized agent, will constitute a *memorandum in writing* within the meaning of the statute of frauds.² Thus, a contract

¹ Calhoun v. Atchison, 4 Bush (Ky.), 261; s. c., 96 Am. Dec. 299; Trevor v. Wood, 36 N. Y. 307; s. c., 93 Am. Dec. 511.

² Watson v. Baker, 71 Tex. 739; s. c., 9 S. W. Rep. 867.

of *employment*, made by a written telegraphic message, is one which is reduced to writing and signed, within the meaning of the Colorado statute of frauds.¹ So, where, in answer to an offer to buy *land*, written and signed instructions of acceptance are given in the usual way to a telegraph company to be telegraphed, and a telegram is sent in the usual way in accordance therewith, there is a sufficient contract in writing within the statute of frauds.²

§ 477. **When Offer Deemed to Have been Accepted.**—The rule on this subject is the same as in the case of contracts by written correspondence through the *mails*. In such a case, it is generally held that the contract is binding on the proposer as soon as a letter accepting the proposal, properly directed to the proposer, is *posted* by the recipient of the proposition, whether it reaches the proposer or not, if posted without unreasonable delay, and provided further, that the post is the ordinary and natural mode of transmitting acceptances.³ It is

¹ Little v. Dougherty, 11 Colo. 103; s. c., 17 Pac. Rep. 292.

² Godwin v. Francis, 39 L. J. (C. P.) 121; s. c., L. R. 5 (C. P.) 121; 22 L. T. (N. S.) 338. S. P., McBlain v. Cross, 25 L. T. (N. S.) 804.

³ Household, etc. Ins. Co. v. Grant, L. R. 4 Exch. 216; Dunlop v. Higgins, 1 H. L. Cas. 381; Duncan v. Topham, 8 C. B. 225; Adams v. Lindsell, 1 B. & Ald. 681; *Re* Imperial Land Co., Harris' Case, L. R. 7 Ch. App. 587; Townsend's Case, L. R. 13 Eq. 148; Potter v. Sanders, 6 Hare, 1; Stocken v. Collin, 7 Mees. & W. 515; Hebbs' Case, L. R. 4 Eq. 9; Tayloe v. Merchants' Fire Ins. Co., 9 How. (U. S.) 390; Trevor v. Wood, 36 N. Y. 307; Abbott v. Shepard, 48 N. H. 14; Hutcheson v. Blakeman, 3 Metc. (Ky.) 80; Hamilton v. Lycoming Ins. Co., 5 Pa. St. 339; Levy v. Cohen, 4 Ga. 1; Falls v. Gaither, 9 Port. (Ala.) 605, 614; Averill v. Hedge, 12 Conn. 424, 436; Wheat v. Cross, 31 Md. 99; s. c., 1 Am. Rep. 28; Potts v. Whitehead, 20 N. J. Eq. 55; Washburn v. Fletcher, 42 Wis. 152; Haas v. Myers, 111 Ill. 421. See the learned note of Mr. Irving Browne in 32 Am. Rep. 40, in which these and other cases are reviewed. Compare MacLay v. Harvey, 90 Ill. 525, where the letter of acceptance was not posted within the time limited. British

conceded by all the judicial authorities that this is the rule where the letter accepting the proposal *actually arrives*; and this rule has been applied in several cases to contracts by telegraph.¹ But the rule, of course, does not apply where, under the arrangement between the parties, as disclosed by the facts, the formation of the contract is made dependent on the *actual communication* by telegraph of the acceptance to the party proposing.²

§ 478. **Place of Contract: Offer in one State, Acceptance in Another.**—Applying the rule to the case of a contract by telegraph, it is held that, where an offer is made in *one State* and accepted by telegraph in *another*, the contract is completed in the *latter State* by sending the telegram, notwithstanding it is to be performed in the former State.³

§ 479. **Certainty in the Proposition and Acceptance.**—In order to constitute a contract, there must be a definite proposition, and an acceptance of the

and *American Tel. Co. v. Colson*, L. R. 6 Exch. 108 (overruled by *Household, etc. Ins. Co. v. Grant*, 4 Exch. Div. 216). See Langdell's *Cases on Contracts*, §§ 1-18. In Massachusetts it is held, contrary to the general current of authority, that the contract is not complete until the letter accepting the offer has been *received* by the party making the offer. *Lewis v. Browning*, 130 Mass. 175 (approving *McCulloch v. Eagle Ins. Co.*, 1 Pick. (Mass.) 278, where the question was directly in issue).

¹ *Minnesota Oil Co. v. Collier Lead Co.*, 4 Dill. (U. S.) 431; *Trevor v. Wood*, 36 N. Y. 307; *Stevenson v. McLean*, 5 Q. B. Div. 348.

² *Haas v. Myers*, 111 Ill. 421; s. c., 53 Am. Rep. 634. An offer of an *indefinite quantity* at a price named, followed by a telegram accepting a *definite quantity* at such price, does not create a contract. *Moulton v. Kershaw*, 59 Wis. 316; s. c., 48 Am. Rep. 516. See also *Beaupre v. Pacific, etc. Tel. Co.*, 21 Minn. 155; *Kinghorne v. Montreal Tel. Co.*, 18 Up. Can. Q. B. 60.

³ *Perry v. Mount Hope Iron Co.*, 15 R. I. 380; s. c., 2 Am. St. Rep. 902.

proposition *as made*.¹ nothing short of this constitutes that *aggregatio mentium* which is essential to the very idea of a contract. A modified acceptance is a rejection. It is scarcely necessary to say that an acceptance must be made to the party proposing, or to his authorized agent: an acceptance communicated to a stranger is a mere *item of news*, and no link in the chain which unites two minds when a contract is made.² Where the plaintiff made a proposition by letter to sell from 3,500 to 5,000 bales of cotton, on stated terms, and the party to whom the offer was made replied by cable: "We offer firm for 1,000 bales," etc.; and in response the following dispatch was sent: "Accept the offer—how much?"—which last dispatch was never delivered,—it was held, in an action against the telegraph company for damages, that the last dispatch, if it had been delivered, would have completed the contract for the sale of 1,000 bales only, and that the jury should have been so instructed.³

§ 480. **View that the Company is not the Agent of the Sender.**—In England and Scotland, the idea that the telegraph company is the agent of the sender to transmit his communication to the addressee, is repudiated.⁴ Thus, the defendant wrote

¹ *Alexander v. Western Union Tel. Co.*, 67 Miss. 385; s. c., 7 South. Rep. 280.

² Hence, telegrams between a principal and agent as to a sale of land, and another from the agent to a third person, saying that an offer for the land was accepted, but which do not show whether such person was or was not the buyer, do not constitute a contract. *Breckinridge v. Crocker*, 78 Cal. 529; s. c., 21 Pac. Rep. 179.

³ *Western Union Tel. Co. v. Way*, 83 Ala. 542; s. c., 4 South. Rep. 844.

⁴ *Henkel v. Pape*, 40 L. J. Exch. 15; s. c., L. R. 6 Exch. 7; 23 L. T (N. S.) 419; 19 W. R. 106; *Verdin v. Robertson*, 10 Sc. Sess. Cas (3d. Series), 35.

to the plaintiffs inquiring upon what terms they could supply him with fifty rifles. They having answered, stating terms, received a telegram from the defendant directing them to forward "the rifles." They accordingly forwarded fifty rifles. It turned out that the message as directed to be sent by the defendant was for three rifles, but the telegram clerk had mistaken the word "three" for "the." The defendant refused to accept more than three rifles. It was held that the defendant was not bound by the mistake of the telegraph clerk, and the plaintiffs therefore could not recover for the price of the remaining forty-seven rifles.¹ We have already seen that, under the decisions in England, if there is a mistake in a message proposing a contract, and the addressee acts upon the faith of the message as received, he cannot recover damages from the company, because there is no privity of contract between him and them.² The doctrine thus stated prevents him from holding the sender of the message to its terms as delivered to him. The result is, that he acts on it at his peril, and if there is a mistake in it, in consequence of which he suffers loss, he cannot recover damages of any one. Such a condition of the law illustrates an obtuse sense of justice on the part of the judges by whom it has been formulated. Judges can easily formulate rules applicable to new situations and new agencies of this kind, which will prevent a denial of justice, if they want to.

§ 481. **The Same View in an American Court.**—The Supreme Court of Tennessee has recently denied the doctrine that the telegraph company is the

¹ *Henkel v. Pape*, 43 L. J. Exch. 15.

² *Ante*, § 422.

agent of the sender of the message, and attempted to distinguish the cases which so hold. The opinion is weakened, not only by the fact that it is against the weight of American authority, but also by the fact that it is self-contradictory. The plaintiffs, in answer to an inquiry by telegraph, sent a dispatch quoting a car-load of meat at \$6.60 per hundred. The dispatch was erroneously delivered to their correspondent so as to read \$6.30. Their correspondent ordered the meat; it was duly shipped; a draft was drawn on them against the shipment, and they refused to honor it to a greater amount than the price quoted in the dispatch as received by them. Thereupon the plaintiffs submitted to the reduction in the price paid, and sued the telegraph company for the difference between the price as quoted in their dispatch as delivered to the company for transmission and as actually transmitted by it. The court *said* that this difference was not the measure of damages, and then proceeded to *hold*, under the circumstances of the case, that it was. The court below had proceeded on the ground that the plaintiffs had made the company their agent, and, as between themselves and their correspondent, were bound by its mistake. But the Supreme Court denied this doctrine in the following language, in its opinion by FOLKES, J.: "The minds of the party who sends a message in certain words, and the party who receives the message in entirely different words, have never met. Neither can, therefore, be bound the one to the other, unless the mere fact of employment of the telegraph company as the instrument of communication makes the latter the agent of the sender. Upon what

principle can it be said such an agency arises? The telegraph company is in no sense a private agent. It is clothed by the State with certain privileges; it is allowed to exercise the right of eminent domain. In exchange for such franchises it is operated with certain duties, one of which is the obligation to accept, and transmit over its wires, all messages delivered to it for that purpose. The parties who resort to this instrumentality have no other means of obtaining the benefits of rapid communication, which is the price of its existence. They have no opportunity and no power to supervise or direct the manner or means which the company uses in the discharge of its duties to the public in the transmission of messages for particular individuals. They can only deliver to the company a legible copy of what they wish communicated, with no expectation that such paper is to be carried to the party addressed; and their connection with the company there and then ceases. They have contracted with the company to transmit the words of the message to the party addressed, through its own agents, and with its own means. The party receiving the message knows that he is not obtaining any communication direct from the sender, but that he is receiving what the company has taken, and changed the form of, from the paper on which it was written, transmitted by electricity over the wires of the company, and reduced to writing at its destination by an agent of the company; and that it only represents what was written by the sender, in the event that there has been no imperfection in the mechanism of the company, nor negligence in the servants of the company. Knowing the scope of the em-

ployment and the methods of transmission, the receiver should be held to know that the sender is bound by the contents of the telegram as received, only so far as it is a faithful reproduction of what is sent. He knows, furthermore, that if he acts on the telegram, and it should turn out to have been altered by the negligence or wrongful act of the company, the latter is liable to him for such injury as he may sustain thereby. Ordinarily, there is no relation of master and servant between the sender of the telegram and the company. Where this relationship does not exist, the principal is not responsible for the torts of the agent; and the negligent delivery of an altered message, when acted on by the receiver to his detriment, is a tort for which the telegraph company alone is responsible. The company retaining exclusive control of the manner of performance, and of its own employees and instrumentalities, the sender of the message being absolutely without voice in the matter, it seems to us that the position of the company to its employer is that of 'independent contractor,' as defined and understood in the well-settled class of cases where the employer is held to be not responsible for the negligence of the contractor in the performance of his work or undertaking. The many and marked differences between the employment of such companies to transmit a dispatch and the employment of a private person to deliver a verbal message, are so manifest that we cannot assume the liability of the sender in the first instance, from his conceded liability in the last, for the negligence of the instrumentality employed. Such a holding not only does violence to well-settled principles of the law of

agency, but may lead to the absolute ruin of the party employing this useful, and now necessary, public medium of rapid transmission of intelligence; so that every consideration of public policy would seem to point to a different result, unless the courts find themselves constrained by the great weight of authority to uphold the contention here made.”¹

But, as the court proceeded to *affirm the judgment*, it is doubtful whether this language can be regarded as more than the *dictum* of the particular judge.”

§ 482. **Weight of American Doctrine to the Contrary.**—It is obvious, however, that the foregoing principle cannot be of universal application. Many cases will arise where the material fact will be, not what was the message which was delivered, but what was the message which was received. The party who originally sends an order by telegraph makes the telegraph company his *agent* for its transmission and delivery, and, as between himself and the person to whom it is addressed, he is bound by the message *as delivered*. It follows that where the legal rights of the receiver of the message founded upon an order transmitted therein, are in question, he is entitled to put in evidence the message *actually received* as the original.²

§ 483. **Ratification of Such Agency.**—Even if it is doubtful whether the sender of the message is bound by a mistake of the telegraph company in transmitting it, on the theory of its being his agent,

¹ *Pepper v. Western Union Tel. Co.*, 87 Tenn. 554; s. c., 40 Alb. L. J. 45; 22 Ohio L. J. 115; 4 L. R. A. 660; 11 S. W. Rep. 783.

² *Saveland v. Green*, 40 Wis. 431; *Ayer v. Western Union Tel. Co.*, 79 Me. 493; s. c., 1 Am. St. Rep. 353, 357; *Durkee v. Vermont Central R. Co.*, 29 Vt. 127; *Morgan v. People*, 59 Ill. 58. *Dicta* to the same effect will be found in *Wilson v. Railroad Co.*, 31 Minn. 481, and in *Howley v. Whipple*, 48 N. H. 488.

he may put the question at rest by ratifying the mistake, as where a principal gave instructions to his factor to sell grain, which instructions were erroneously transmitted, in consequence of which the grain was sold at a loss, and subsequently the principal accepted part payment from his agent, after having acquired knowledge of the mistake.¹

§ 484. **Rights of Sender of Message against Company in Such a Case.**—The American rule, in short,² is that the sender of a telegraphic message containing a proposal for a contract of sale or other contract, makes the telegraph company his agent, and, as between himself and the person to whom the message is sent, is bound by the terms of the message as delivered. If, therefore, the message, as delivered, contains a proposal different from the message as started, the sender must stand by the proposition and sue the telegraph company, his agent, for the damages which he has sustained through its misfeasance.³ In such a case the measure of the damages which the sender will be entitled to recover will be what he has actually lost by the negligence of the company.

¹ *Culver v. Warren*, 36 Kan. 391; s. c., 13 Pac. Rep. 577.

² *Ayer v. Western Union Tel. Co.*, 79 Me. 493; s. c., 1 Am. St. Rep. 353; *Telegraph Company v. Schotter*, 71 Ga. 760. Contrary to the doctrine of the text is the case of *Pegram v. Western Union Tel. Co.*, 100 N. C. 28; s. c., 6 Am. St. Rep. 567; 6 S. E. Rep. 557. This decision is inexplicably wrong. The plaintiff, who was a broker, had telegraphed to his correspondents as follows: "Party offers one hundred shares C. C. & A. at forty-three. Answer quick." This, it is perceived, was a proposition to the party addressed for a sale of shares of the stock named at the price named. The message, as received at its destination and delivered, read "forty" instead of "forty-three." In reply to this the plaintiff received the following dispatch: "Will take the hundred shares; draw at sight, with stock attached." Thereupon, at once, on the same day, the plaintiff purchased 101 shares of the stock named, and made his draft on his correspondents for \$4,343, the price of the

§ 485. **Illustration : Sender must Fulfill Offer as Delivered, and Seek Recourse of the Telegraph Company.**—The plaintiff telegraphed to a correspondent the following proposition: "Can deliver hundred turpentine at sixty-four." As delivered to his correspondent by the telegraph company, the message read: "Can deliver hundred turpentine at sixty," the word "four" being omitted. The receiver of the message immediately telegraphed his acceptance. The sender shipped the turpentine and drew for the price at sixty-four. The receiver refused to pay more than sixty. The sender accepted the sixty, and sued the telegraph company for the difference between sixty and the market price. It was urged that the sender was

stock at 43, and sent the same to a bank for collection, with the stock attached, with instructions to the bank to deliver the stock when the draft should be paid. When the bank presented the draft for payment, the intending vendees were surprised at the amount, and called upon the plaintiff for an explanation, who at once replied: "My offer was forty-three plainly, and you replied, 'Will take stock,' and bought on your reply." The plaintiff's correspondents made known to him the form in which the dispatch had been transmitted to them, and he refusing to stand by the contract according to the proposition as the telegraph company had delivered it to them, they brought an action against him and properly recovered what they had lost by reason of his refusing to stand by his proposition as they had received it. In that action he notified the telegraph company to defend, which it declined to do. Thereupon he brought an action against the telegraph company to recover over from it what he had been compelled to pay his correspondents by reason of the mistake of the company. It is to be regretted that, upon a case so plain, an American court should have been found which could hold that the plaintiff could not recover. It was not a case of speculative or remote damages, but of damages actually sustained through a plain blunder of the telegraph company, which the plaintiff had constituted his agent to make the proposition of sale to his correspondents. Davis, J., dissented, on the ground that the damages which the plaintiff sustained were the direct consequences of the negligence of the telegraph company. If this absurd decision is law, then a plaintiff cannot recover of his own agent the damages which he has directly sustained through the negligence of such agent.

not bound to accept the sixty, as that was not his offer. But the court held that there was a completed contract at sixty, that the sender was bound to fulfill it, and that he could recover his consequent loss of the telegraph company.¹

§ 486. **Another Illustration.**—Another excellent illustration of the rule that the party who makes a communication to another is bound by the mistake of his agent appointed by him to make it, under the rule of *respondeat superior*, is found in a case where, the company's operator being absent, the defendant verbally requested R., who was not a servant of the company, to send a certain telegram, promising to guarantee the payment of a bill for goods. It was held that R. became the defendant's agent; and he having by mistake telegraphed an original instead of a collateral promise, that the defendant became responsible as an original debtor for the goods sent.²

§ 487. **A Qualification of the Rule.**—A qualification to the foregoing rule seems to exist on principle, which may be stated thus: The party who *first invites the use* of the telegraph as the means of communication in respect of the particular transaction, impliedly agrees to take the risk of any mistakes which may be made by the telegraph company. Somewhat in line with this, though not fully recognizing it, is the following language of REDFIELD, C. J.: "In regard to the particular end of the line where inquiry is first to be made for the original, it depends upon which party is responsible for the

¹ *Telegraph Company v. Schotter*, 71 Ga. 760. See also *Ayer v. Western Union Tel. Co.*, 79 Me. 493; s. c., 1 Am. St. Rep. 353, where a similar ruling was made on similar facts.

² *Dunning v. Roberts*, 35 Barb. (N. Y.) 463.

transmission across the line, or, in other words, whose agent the telegraph is. The first communication in a transaction, if it is all negotiated across the wires, will only be effective in the form in which it reaches its destination, * * * But where the party to whom the communication is made is to take the risk of transmission, the message delivered to the operator is the original, and that is to be produced, or the nearest approach to it, by copy or otherwise.”¹

¹ *Durkee v. Vermont, etc. R. Co.*, 29 Vt. 127, 140; approved in *Morgan v. People*, 59 Ill. 58.

CHAPTER XVI.

TELEGRAPHIC DISPATCHES AS EVIDENCE.

SECTION.

- 492. Relevancy of Telegraphic Dispatches as Evidence.
- 493. Obligation of Telegraph Company to Produce them under Legal Process—Their Inviolability.
- 494. Statutory Protection of Such Messages.
- 495. Sufficiency in the Description in the Subpœna Duces Tecum.
- 496. Which is the Original, the Dispatch as Sent or the Dispatch as Received?
- 497. When the Message as Sent is Deemed the Original.
- 498. Proof of Authenticity.
- 499. Presumption that the Message as Delivered to the Company was Delivered to the Person Addressed.
- 500. Illustration.
- 501. Delivery not Proved by Producing Reply.
- 502. Under what Circumstances the Copy is Admissible.
- 503. Illustrations.
- 504. When Oral Evidence Admissible.
- 505. Illustration: Secondary Evidence Admissible.
- 506. When Parol Evidence Competent without Notice to Produce.
- 507. Has Evidentiary Effect of a Letter.
- 508. Notice of Injunction by Telegram.
- 509. English Practice: How Such Notice Communicated by Telegram, and Duty of Sheriff's Officer Respecting Same.

§ 492. **Relevancy of Telegraphic Dispatches as Evidence — Declarations— Contracts.—** Telegraphic messages are admissible in evidence under a variety of circumstances and for a variety of purposes.

Such a message is, for instance, when supplemented by the necessary oral proof, the best evidence that the particular message was sent. It may, as already seen, in connection with telegrams or letters, form a link in the chain of correspondence which constitutes a contract.¹ It may also be a memorandum of an agreement to take a case, for instance, of the sale of goods, out of the statute of frauds.² It may contain a proposition, or the acceptance of a proposition, such as will, in law, be binding on the sender as an obligation, and this although it may have been negligently altered by the company (the sender's agent) in its transmission.³ It is also admissible against the sender, as evidence of his *declarations*, and also as evidence tending to show communications to the person addressed, if proved to be in the sender's handwriting, and to have been received at the telegraph office, and sent over the wires properly directed to a person who was then living at the place of its destination.⁴ It may furnish an important link in a chain of *circumstantial evidence* in a criminal prosecution. For instance, a telegraphic message offering to *sell horses* is admissible in evidence against a defendant charged with *stealing the horses*, in connection with other

¹ A telegraphic dispatch, in reply to one delivered to a boat at Lexington, on the Missouri River, agreeing to transport freight, without naming to what place, has been allowed to be read to the jury as evidence of a contract by the master to transport to St. Louis. *Taylor v. The Robert Campbell*, 20 Mo. 254. See *ante*, § 475.

² *Ante*, § 476.

³ *Ante*, § 482.

⁴ *Commonwealth v. Jeffries*, 7 Allen (Mass.), 548. But telegraphic dispatches from the *wife* of one of the defendants, in an action for a *conspiracy*, neither written nor sent by either of them, are not admissible as evidence against them; for, as the *declarations of the wife*, they could not affect even her husband. *Benford v. Tanner*, 40 Pa. St. 9.

circumstances tending to show his preparation for flight.¹

§ 493. **Obligation of Telegraph Company to Produce them under Legal Process—Their Inviolability.**—Telegraphic messages are not *privileged communications*.² Telegraph companies are not exempt from the obligation of producing them in compliance with legal process; for instance, a *subpœna duces tecum*, issued by the clerk of a court of criminal jurisdiction at the request of a grand jury.³ The manager of a local telegraph office, when properly served with process, cannot refuse to produce dispatches therein called for, on the ground that to do so would be a violation of his duty to the company; and the court does not exceed its jurisdiction in committing such a witness for contempt in refusing to obey the subpœna,⁴—provided the dispatches are *sufficiently identified* therein, in conformity with the rule stated in the next section.⁵ Nor is it any reason for refusing to obey such a subpœna, that there is a *statute* providing for the punishment of any officer or servant of a telegraph company for *disclosing the contents* of any dispatch. Such a statute does not apply in such a case,⁶ for in the construction of such statutes it is understood that there is always an exception in favor of legal

¹ *State v. Espinozel*, 20 Nev. 209; s. c., 19 Pac. Rep. 677.

² *State v. Litchfield*, 58 Me. 267; *Ex parte Brown*, 72 Mo. 83; s. c., 37 Am. Rep. 426; *National Bank v. National Bank*, 7 W. Va. 544; *Re Waddell*, 8 Jur. (N. S.) 181, Part 2; S. P., *Re Ince*, 20 L. T. (N. S.) 421.

³ *Ex parte Brown*, 7 Mo. App. 484; *Ex parte Brown*, 72 Mo. 83; s. c., 37 Am. Rep. 426.

⁴ *Ex parte Brown*, 7 Mo. App. 484.

⁵ *Ex parte Brown*, 72 Mo. 83; s. c., 37 Am. Rep. 426.

⁶ *Ex parte Brown*, 7 Mo. App. 484; *Woods v. Miller*, 55 Iowa, 168; s. c., 39 Am. Rep. 170.

process.¹ Nor is the rule confined to process issuing in criminal cases. A telegraph operator, having possession of a telegraphic dispatch, may be compelled by a party to the suit, who was also a party to the telegraphic communication, and who is seeking to prove a *contract* by it, to produce it in court, although there is a statute forbidding telegraph operators to divulge the contents of dispatches to any one except the person addressed.² The court reasons as follows: "That the statute does not prohibit the production and introduction of messages as evidence, under an order of court for that purpose, might be demonstrated by saying that the person who produces them in obedience to the order is not guilty of *voluntarily* disclosing their contents, and no person can be punished for an act which is not voluntary."³ By statute, in England,⁴ where the telegraph system has passed under the control of the government and become a part of the postal service, every written or printed message or communication delivered at a post-office for the purpose of being transmitted by a postal telegraph, and every transcript thereof made by any person acting in pursuance of the orders of the Postmaster-General, shall be a post-letter, within

¹ Lee v. Birrel, 3 Camp. 337. In this case the clerk of an official had, on entering upon his office, taken an oath not to disclose anything that he should learn in that capacity. But Lord Ellenborough nevertheless required him to produce a book making a disclosure of the secrets of his office, saying: "I think that the oath contains an implied exception of the evidence to be given in a court of justice, in obedience to a writ of subpoena. The witness must produce the book, and answer all questions respecting the collection of the tax, as if no such oath had been administered to him."

² Woods v. Miller, 55 Iowa, 168; s. c., 39 Am. Rep. 170.

³ *Ibid.* per Adams, C. J.

⁴ Telegraph Act, 1869, 32 and 33 Vict. ch. 73, § 23.

the meaning of the 7 Will. 4 and 1 Vict. ch. 36; provided always, that nothing in the act contained shall have the effect of relieving any officer of the post-office from any liability which would, but for the passing of the act, have attached to a telegraph company or to any other company or person, to produce in any court of law, when duly required so to do, any such written or printed message or communication.

§ 494. **Statutory Protection of Such Messages.**—Statutes have been enacted in some of the States punishing the tampering with or divulging the contents of telegraphic messages: of which a recent statute of North Carolina may be cited as an example: "Any person who wrongfully obtains, or intends to obtain, any knowledge of a telegraphic message by connivance with a clerk * * * or other employee of a telegraph company," or, being such employee, willfully divulges, "to any but the persons for whom it was intended, the contents of a telegraphic message or dispatch entrusted to him for transmission or delivery, * * * or willfully refuses or neglects duly to transmit or deliver the same;" "or any person who willfully and without authority opens or reads a sealed letter or telegram, or publishes the same, knowing it to have been opened or read without authority, shall be guilty of a misdemeanor."¹ A recent statute of Connecticut prescribes a penalty for tapping telegraph or telephone wires.¹

§ 495. **Sufficiency of the Description in the Subpoena Duces Tecum.**—It was held in the St. Louis

¹ N. C. Act Jan. 31, 1889; Laws 1889, ch. 41, p. 61.

Conn. Act March 20, 1889; Pub. Acts 1889, ch. 30, p. 18.

Court of Appeals that a call, in a subpoena *duces tecum*, issued by the clerk of a criminal court, at the request of the grand jury, for *any and all messages passing between certain named parties during the last six months*, is sufficiently certain to require the local agent of the telegraph company to produce the dispatches, without making further reference to their subject-matter.¹ Lewis, P. J., dissented, holding that a subpoena *duces tecum* must give such a description of the paper to be produced as will identify it as the particular paper called for; that a description so general in its terms as that just recited does not sufficiently describe the papers, and that such a subpoena should not be enforced by process of contempt. He further reasoned that a subpoena which calls for a considerable number of papers, for the manifest purpose of ascertaining whether any of them may be found to be material to the matters under judicial investigation, is a *search*; and that, if calculated to compel the production of private papers not material to the investigation, it is an *unreasonable search*, within the meaning of the constitutional inhibition against "unreasonable searches and seizures." Another subpoena *duces tecum* having been issued at a subsequent term of the same court, at the request of the grand jury, directed to the same person, commanding him to produce all telegraphic dispatches, or copies of the same, in the telegraph office of which he was manager, passing between certain parties named "within *fifteen months last past*," an application for *habeas corpus* was made before the Supreme Court of Missouri. The Supreme Court

¹ *Ex parte Brown*, 7 Mo. App. 484.

took the view taken by Lewis, P. J., in his dissenting opinion in the St. Louis Court of Appeals, and discharged the prisoner. In reaching this conclusion the Supreme Court was obliged to dissent from the view taken by Judge Dillon, of the United States Circuit Court, in an important trial.¹ In giving the opinion of the court, HENRY, J., said: "Here, communications at different times within a period of fifteen months, sent or received by the parties named, are called for. The date, title, substance, or subject-matter of none of them is given, and it is utterly impossible that it could have been made to appear, without more, that any of the messages were material as evidence before the grand jury. Moreover, it not only called for all messages between the parties named, but for all which may have been sent or received by either of the parties, to or from, any person on the face of the earth. A compliance with the order might have resulted in the production of confidential communications between husband and wife, client and attorney, confessor and penitent, parent and child. Matters which it deeply concerned the parties to keep secret from the world, and of no importance or value as evidence in any cause, might thus be disclosed, to the annoyance and shame of the only persons interested. Incidents in the lives of members of families which the happiness and welfare of the household require to be kept secret, might be exposed, and offenses not recognizable by the law, long since committed and condoned, brought to light and hawked through the country by scandal-mongers, to the disturbance of the peace of society

¹ United States v. Babcock, 3 Dill. (U. S.) 567.

and the destruction of the happiness of whole households. It is no answer to this that the obligation of secrecy imposed by law on grand juries would prevent such exposure. It is enough to disturb and harass a man, that twelve of his neighbors, though sworn to secrecy, have acquired knowledge diminishing their respect for him, which they had no right to obtain, and they may be the very twelve men with whom, above all others, he most desired to be in good repute. Such an inquisition, if tolerated, would destroy the usefulness of this most important and valuable mode of communication by subjecting to exposure the private affairs of persons intrusting telegraph companies with messages for transmission, to the prying curiosity of idle gossips, or the malice of malignant mischief-makers.'''¹

§ 496. Which is the Original, the Dispatch as Sent or the Dispatch as Received?—It frequently becomes a question which is the original, the dispatch as sent or the dispatch as received; and the question becomes very important in cases where it is garbled in transmission. As suggested in the foregoing chapter,² this generally depends upon the

¹ *Ex parte Brown*, 72 Mo. 83; s. c., 37 Am. Rep. 426, 431. See also *Shaftesbury v. Arrowsmith*, 4 Ves. 66. See a very learned and elaborate paper on the inviolability of telegrams, read by Henry Hitchcock, Esq., before the American Bar Association in 1879 (5 South. Law Rev. (N. S.) 473 *et seq.*), in which the writer criticises *Ex parte Brown*, 7 Mo. App. 484. That such communications are *not privileged*, see *Com. v. Jeffries*, 7 Allen (Mass.), 548; *National Bank v. National Bank*, 7 W. Va. 544; *Heinslee v. Freedman*, 2 Pars. Sel. Cas. 274. On a subpoena from the Irish Court of Bankruptcy to produce all telegrams sent by the bankrupt from a certain date, the secretary of the post-office was ordered to produce the documents sought for, the court intimating that such subpoenas should be prepared so as to meet the convenience of the official. *Re Thomas Smith*, 7 L. R. Ir. 286.

² *Ante*, § 480 *et seq.*

solution of the question which party to the correspondence has made the telegraph company its agent for transmitting the dispatch in question; if it is garbled by the agent of the sender, he is bound by it as delivered,—just as a merchant or other person is bound by the terms of a letter dictated to his secretary and erroneously transcribed by him. Such a message, as delivered to the person addressed, is the primary and best evidence of its contents, as between the sender and the receiver, when there is no proof of mistake, and the sender has taken the initiative, making the telegraph company his agent for the transmission.¹

§ 497. **When the Message as Sent is Deemed the Original.**—Where the general inquiry is what message was in fact *sent*,—and this will be the scope of the inquiry in most cases, civil and criminal,—the message which is *sent*, and not the one which is *received* and transcribed at the other end of the line, is the *original*. The latter is a *copy*, and where it is material to prove the original, the latter carries with it none of the qualities of primary evidence.² But it will be obvious on reflection that this rule is not universal. Where it is material to prove the contents of the dispatch *as delivered*, that is to say, where it is material to prove the contents of the copy,—it is not perceived on what principle this is proved by proving the contents of the original, for *non constat* that the

¹ *Anheuser-Busch Brewing Co. v. Hutmacher* (Ill.), 4 L. R. A. 575; s. c., 21 N. E. Rep. 626.

² *Matteson v. Noyes*, 25 Ill. 591; *Smith v. Easton*, 54 Md. 138. See also *Howley v. Whipple*, 48 N. H. 487; *United States v. Babcock*, 3 Dill. (U. S.) 567; *Barens v. Brown*, 25 Kan. 410; *National Bank v. National Bank*, 7 W. Va. 544; *Kinghorne v. Montreal Tel. Co.*, 18 Up. Can. Q. B. 60.

copy may not have deviated from the original. It has been well observed: "There is some difficulty in determining whether the message delivered to the telegraph office, or that which is delivered to the person to whom it may be addressed, at the point of destination, is to be regarded as the original. Perhaps under some circumstances the one or the other may be considered the original."¹ Although it may not be ordinarily admissible to prove the contents of the dispatch as delivered to the company, yet the view has been taken that this may be dispensed with, and that evidence of the dispatch, as delivered by the transmitting company, may be received, where the original dispatch and the office from which it was sent are *beyond the jurisdiction* of the court.²

§ 498. **Proof of Authenticity.**—But it should also be borne in mind that such messages, even when admissible in evidence, stand on the footing of mere private writings: they do not, like public records, official acts under the seals of sovereign States, of which the courts take judicial notice, *prove themselves*. Evidence must in all cases be given of their authenticity. When, therefore, a paper was offered in evidence, purporting to contain a dispatch received at a telegraph office, and no proof was made that it was in the handwriting of any person employed in the telegraph office at the time when it purported to have been received, and no other proof of its authenticity was given, it was held

¹ Brickell, C. J., in *Whilden v. Merchants', etc. Bank*, 64 Ala. 1; s. c., 38 Am. Rep. 1, 4.

² *Ibid.*

that it was inadmissible as evidence.¹ The Court of Appeals of Maryland have said: "Ordinarily, the usual course is to show the delivery of the original message of the party sought to be charged, at the office from which it is to be telegraphed, and then show that it was transmitted and delivered at the place of its destination. But even where the original is produced, its authenticity must be established, and this either by proof of the handwriting or by other proof establishing its genuineness. The destruction of all the messages sent from the office on the day named, is sufficient foundation for the admissibility of secondary evidence. But this secondary evidence can only be admitted upon proof that the copy offered is a *correct transcript* of a message actually authorized by the party sought to be affected by its contents."²

§ 499. **Presumption that the Message as Delivered to the Company was Delivered to the Person Addressed.**—There is judicial authority for the proposition that, where the delivery of a message to a telegraph company for transmission is proved, it is presumed that it was delivered to the person to whom it was addressed, in the absence of evidence to the contrary.³ This rule of evidence, which applies to letters properly sealed, addressed and deposited in the United States mail for transmission, cannot, it is believed, be safely extended to telegraph compa-

¹ *Richie v. Bass*, 15 La. An. 668.

² *Smith v. Easton*, 54 Md. 138. See also *Howley v. Whipple*, 48 N. H. 487; *United States v. Babcock*, 3 Dill. (U. S.) 567; *Abb. Tr. Ev.* 290.

³ *Oregon, etc. R. Co. v. Otis*, 17 N. Y. Week. Dig. 352; s. c., *Memo-randum*, 30 Hun (N. Y.), 382; *Com. v. Jeffries*, 7 Allen (Mass.), 548; s. c., 83 Am Dec. 712, 716. See also the rule relating to letters deposited in the post-office, 1 *Greenl. Ev.*, § 40, and cases cited. *Dana v. Kemble*, 19 Pick. (Mass.) 112.

nies; for, although messages delivered to such companies are usually delivered as received by the company, instances of non-delivery, or of incorrect transmission are so frequent that it would be extremely unsafe to extend the presumption to such an agency.

§ 500. *Illustration.*—On the trial of an indictment for obtaining goods under false pretenses, objection was taken to the competency of certain telegraphic messages which were shown to be in the handwriting of the defendant, and which were offered in evidence by the commonwealth as tending to prove communications made by the defendant to parties in New York to whom they were addressed. It was ruled that, inasmuch as these papers were entirely competent as *admissions* by the defendant, it was not material to show that their contents were made known to the persons to whom they were sent, and that the rights of the defendant were not prejudiced by the fact that the jury were left to infer that they had actually reached their destination. But, as it was affirmatively proved that all these messages were received by the operators at the telegraph office where they had been delivered for transmission, and that they were by them duly transmitted over the wires, directly to the parties to whom they were addressed,—it was held that the case came within the principle on which proof of letters, deposited in the post-office and duly directed, is admitted as evidence to show that they reached their destination and were received by the persons to whom they were addressed.¹

¹ Com. Jeffries, 7 Allen (Mass.), 548; s. c., 83 Am. Dec. 712, 716.

§ 501. **Delivery not Proved by Producing Reply.**—The fact that a telegraphic message was *delivered* to a man on a certain day at a distant place, is not proved by producing what purports to be a telegraphic *reply* signed by him, received at the sending office, very soon afterwards on the same day, and addressed to the sender of the former dispatch; for, although men in the ordinary affairs of life constantly act upon such evidence, yet the only way to prove such a message in a court of law is to summon both the intervening agents or bearers of the message,—that is, the agent of the telegraph company receiving and transmitting the message, and the agent at the end of the transit, receiving and delivering it,—and by them proving its transmission and delivery. It is reasoned that anything short of this would be to rely upon *hearsay evidence* of the loosest character.¹

§ 502. **Under what Circumstances the Copy is Admissible.**—Having determined, as between the dispatch which was *sent* and that which was *received*, which is the *original* and which the *copy*, the next inquiry will often be, under what circumstances the *copy* is admissible in evidence. The well-known rule which requires the *best evidence* demands the production of the original when that can be had, and excuses it when it cannot, and admits the copy in its stead, but of course, only on proof that it is a copy. Telegraph companies cannot preserve the originals of messages forever: they cannot furnish room for the vast accumulation. They, therefore, have rules for keeping them a certain length of time and then destroying them. But it is not necessary

¹ Howley v. Whipple, 48 N. H. 487.

to prove the existence of such a rule by introducing *it* in evidence as a document in order to show that the original of the dispatch has been lost, so as to let in a copy as evidence, there being no evidence that the rule is in writing or in print.¹ In every such case there must be *satisfactory evidence* of the loss of the original in order to let in the copy; and this, though a question of fact, is always to be decided by the judge, and is not to be submitted to the jury.²

§ 503. *Illustrations.*—This is well illustrated by a case where the plaintiff claimed credit for a certain payment sent by express, in obedience to a telegram from defendant. He introduced employees of the telegraph office to show that the original telegram could not be found, and that it was the rule of the office not to preserve such papers after six months, which in the particular case had elapsed. He then introduced evidence that the copy of the telegram in evidence was in the handwriting of a former employee of the office, and that the money had been sent by express, and received by the defendant. The court held that this was a sufficient foundation for the use of the copy of the telegram, without introducing the rule of the office, there being no proof that it was in print or writing.³ In an action by the assignee of a landlord against a tenant, who has held over after the expiration of his year, in which the plaintiff claims that the tenant has become liable to pay a certain increased rent, the copy of a telegram received by the tenant, showing upon its

¹ *Riordan v. Guggerty*, 74 Iowa, 688; s. c., 39 N. W. Rep. 107.

² *Thomp. Trials*, § 804.

³ *Riordan v. Guggerty*, 74 Iowa, 688; s. c., 39 N. W. Rep. 107.

face that it was in response to a letter written by the tenant's attorney to the landlord, asking for terms of a renewal, and confirmed by a subsequent letter of the landlord containing the same propositions, has been held admissible, without producing the original.¹

§ 504. **When Oral Evidence Admissible.**—The rule that secondary evidence of the contents of a writing is inadmissible, unless the absence of the original is accounted for, is, of course, applicable to telegrams² and to cablegrams.³ *Oral evidence* of the contents of a telegram cannot, of course, be received until a sufficient excuse is shown for the non-production of the original.⁴ But this rule cannot be invoked where it does not appear that the telegrams were in writing,⁵ which is not *necessarily* the case.⁶ It has been held, in an action against the telegraph company itself, that the delivery of a cablegram to the addressee, by the company, as coming from "Victoria," with proof that that was the cipher name of the addressee's correspondent at the place from which the message was sent, is *prima facie* sufficient to show that it was sent by such correspondent; and where the message delivered to the addressee has been lost or destroyed, and that delivered for transmission is without the jurisdiction

¹ Thorp v. Philbin, 2 N. Y. St. Rep. 732.

² McCormick v. Joseph, 83 Ala. 401; s. c., 3 South. Rep. 796.

³ Wilson v. Holt, 83 Ala. 528; s. c., 3 Am. St. Rep. 768; 3 South. Rep. 32.

⁴ McCormick v. Joseph, *supra*.

⁵ Terre Haute, etc. R. Co. v. Stockwell, 118 Ind. 98; s. c., 20 N. E. Rep. 650.

⁶ See, for a case where all the message is oral, Western Union Tel. Co. v. Stevenson, 128 Pa. St. 442; s. c., 5 L. R. A. 515; 24 W. N. C. 497; 18 Atl. Rep. 441.

of the court, secondary evidence of their contents is admissible, whichever be regarded as the original.¹

§ 505. **Illustration: Secondary Evidence Admissible.**—In an action for goods sold and delivered, the plaintiff's agent testified that he had received an order from the defendant by telegram, which was replied to by letter, and a person sent to take necessary measurements. The telegraph company had destroyed all memoranda relating to telegrams of the date of the transaction. The plaintiff had not preserved the defendant's original telegram, nor any copy of the letter in reply; but the witness who took the measurements testified that he saw and conversed with the defendant about the order. The court held that secondary evidence of the contents of the telegram was admissible.²

§ 506. **When Parol Evidence of Message Competent without Notice to Produce.**—In Texas, in an action for damages for the non-delivery of a telegraphic message, parol evidence of the contents of the message is competent, without notice to produce the original. The court say that there is a recognized exception to the rule which requires notice to be given to produce the original instrument before secondary evidence can be resorted to, which arises when, from the very nature and character of the action, the defendant must know that he is charged with the possession of the instrument.³

¹ *Western Union Tel. Co. v. Way*, 83 Ala. 542; s. c., 4 South. Rep. 844. For evidence held not sufficient to justify a jury in finding that a message blank was torn, see *Kiley v. Western Union Tel. Co.*, 109 N. Y. 231; s. c., 16 N. E. Rep. 75.

² *Filut v. Kennedy*, 33 Fed. Rep. 820.

³ *Reliance Lumber Co. v. Western Union Tel. Co.*, 58 Tex. 394; s. c.

§ 507. **Has Evidentiary Effect of a Letter.**—Generally speaking, a telegram, if properly identified, will have the evidentiary effect of a letter.¹

§ 508. **Notice of Injunction by Telegram.**—It has been held in Great Britain that sufficient notice of the granting of an injunction may be given by telegram.² In one such case a sheriff's officer and an auctioneer proceeded with the sale of the property of a trader, seized under a *fi. fa.*, after they had received notice *by a letter* from the debtor's solicitor, that he had filed a liquidation petition, and had also received notice, *by telegram* that the Court of Bankruptcy had made an order restraining further proceedings under that writ. It was held that the plaintiff's officer and the auctioneer had been guilty of *contempt* of court, and that they must pay the costs of a motion to commit them.³ But if it is sought to commit for contempt a person, who, after receiving such a notice, disregards it, the court must decide upon the particular facts, whether he had in fact notice of the injunction, and it is the duty of those who ask for the committal to prove this beyond a reasonable doubt.⁴ It was held in such a case that the person violating the injunction will not be committed for contempt if he swears that, though he had received notice of it by telegram, he *bona fide* believed that no injunction had been granted,

¹ 44 Am. Rep. 620. As to this exception to the rule which requires the production of the instrument without notice, see *Hamilton v. Rice*, 15 Tex. 382, 385; *Dean v. Borden*, 15 Tex. 298; 1 Greenl. Ev., § 561.

² *Coupland v. Arrowsmith*, 18 L. T. (N. S.) 755, *semble*.

³ *Re Bryant*, L. R. 4 Ch. D. 98; s. c., 35 L. T. (N. S.) 489; 25 W. R. 230.

⁴ *Ibid*.

⁵ *Exp. Langley, Exp. Smith, Re Bishop*, 13 Ch. Div. 110; s. c., 49 L. J. Bky. 1; 41 L. T. 388; 28 W. R. 174.

and the circumstances show that such a belief was not unreasonable.¹

§ 509. **English Practice: How Such Notice Communicated by Telegram and Duty of Sheriff's Officer Respecting Same.**—It has also been held in that country that a London solicitor, who obtains an order from the Court of Bankruptcy in London, restraining a sale under an execution in the country, instead of telegraphing the order to the sheriff's officer, ought to telegraph it to a solicitor at the place, as his agent, asking him to give notice of it to the person affected.² Moreover, in that country, it is the duty of a sheriff's officer who receives notice by telegram, purporting to be sent by solicitors in London, of an injunction being granted by the Court of Bankruptcy, to restrain a sale in the country under an execution, to telegraph to the Court of Bankruptcy, or to the London agents of the sheriff, to ascertain whether an injunction has really been granted.³ This, however, is not the duty of the auctioneer who is conducting the sale; he is only bound to communicate with the sheriff's officer who has instructed him to sell.⁴ Moreover, a sheriff's officer who is not himself present at the sale, and who has no actual notice of the injunction, is not responsible for the act of his deputy who allows the sale to be continued after receiving notice by telegram.⁵

¹ *Exp. Langley, Exp. Smith, Re Bishop*, 13 Ch. Div. 110; s. c., 49 L. J. Bky. 1; 41 L. T. (N. S.) 388; 28 W. R. 174.

² *Ibid.*

³ *Ibid.*

⁴ *Ibid.*

⁵ *Ibid.*

CHAPTER XVII.

MISCELLANEOUS MATTERS.

SECTION.

- 513. Purpose of This Chapter.
- 514. Real Property.
- 515. Wires when Construed as Personalty.
- 516. Electric Light Plant the Subject of a Material-man's Lien.
- 517. Injunction against the Use of Telegraph Ciphers.
- 518. Municipal Taxation of Telegraph Companies Outside of City Limits.
- 519. Municipal Tax not Exempting Government Business Void.
- 520. What Municipal and State Taxation Interferes with Interstate Commerce.
- 521. Leasing Line and Breach of Contract for Continuous Business.

§ 513. **Purpose of This Chapter.**—In the preparation of this volume two or three matters which seemed to belong to such a work escaped classification; two or three decisions eluded the search of the author; and two or three others appeared after the chapters in which they otherwise should have been classified were put in type. They are, therefore, gathered together in this chapter.

§ 514. **Real Property.**—Electric light poles, wires and lamps have been held to be real property.¹

§ 515. **Wires when Construed as Personalty.**—It has been held that telegraph *wires* fixed to poles do

¹ Keating Implement, etc. Co. v. Marshall Electric, etc. Co., 74 Tex. 605; s. c., 12 S. W. Rep. 489.

not lose their character as personalty and become a part of the realty covered by a previously existing mortgage, where it is the intention and agreement of the parties putting up the wires that they shall remain personalty subject to be removed.¹

§ 516. **Electric Light Plant the Subject of a Material-man's Lien.**—An electric light plant furnished for a *steamboat*, for the creation and distribution of electric lights, comes within Code Miss. 1880, § 1378, giving a lien on the boat for "material furnished about the erection and construction, alteration or repairs." The right of lien in such cases rests on the terms of the particular statute; but all such statutes proceed upon the idea of giving a lien to the mechanic who has done labor, or the material-man who has furnished materials, which enter into and become a part of the permanent structure.

§ 517. **Injunction Against the Use of Telegraph Ciphers.**—A telegram company in London made an arrangement with the defendants, being two individuals in Australia, for the transmission of messages, in which certain words were used as short expressions of the names and addresses of the principal customers; and the defendants were described as agents of the telegram company. In a little time the parties quarreled, and one of the defendants came to England to carry on an independent telegram business with his partner in Australia, and sent circulars to the customers of the telegram company, mentioning that he had their ciphers. On

¹ *Boston Safe Deposit, etc. Co. v. Bankers', etc. Tel. Co.*, 36 Fed. Rep. 288.

² *Mulholland v. Thomson-Houston Electric Light Co.*, 66 Miss. 339; s. c., 6 South. Rep. 211.

motion to restrain him from using the ciphers, it was held that there was nothing confidential in the ciphers, and that he was entitled to use them.¹

§ 518. **Municipal Taxation of Telegraph Companies Outside of City Limits.**—It was held by the Court of Common Pleas of Charleston, South Carolina, in a learned opinion by Judge Izlar, that an act of the legislature authorizing a municipal corporation to require payment of a license tax by any person engaged in any calling, business or profession “in whole or in part within the city,” does not authorize an ordinance requiring a telegraph company having an agency in the city to pay a license tax for “business done within the State, and not including that done without the State.” Such ordinance is *ultra vires* and void, as it assumes to tax business done outside the limits of the city.²

§ 519. **Municipal Tax not Exempting Government Business Void.**—The same learned judge, in the same case, holds that a telegraph company which has accepted the restrictions and obligations of the Act of Congress of July 24, 1866,³ and is engaged in the transmission of messages as required by said act for the Federal government, is a government agent, and a statute of the State or municipal ordinance imposing a license tax on its business, which does not exempt government business, is in contravention of the Act of Congress and in violation of that provision of the Federal Constitution,⁴ which confers upon Congress the power to establish post-

¹ Reuter's Telegram Company v. Byron, 43 L. J. Chanc. 661.

² Charleston v. Postal Telegraph Co., 9 Rail. & Corp. L. J. 129.

³ *Ante*, § 2.

⁴ Art. 1, § 8.

offices and post-roads.¹ If there could be any doubt as to the propriety of this conclusion, a reading of the opinion delivered by the learned judge would dispel it.

§ 520. **What Municipal and State Taxation Interferes with Interstate Commerce.**—Since the first chapter of this work was put in type, two decisions have come to the notice of the writer on this subject. One of them, rendered by the Circuit Court of the United States for the Eastern District of Pennsylvania, holds that the city of Philadelphia is not authorized to tax a telegraph company occupying its streets, and could not even, if authorized, tax a company engaged in interstate commerce.² The other, rendered by the Supreme Court of Pennsylvania³ (in a *per curiam* opinion, affirming the opinion of Judge Trunkey in the court below), holds that a State tax on the *gross receipts* of a telegraph company from messages between points within and points outside of the State, and from messages between points in other States, which pass over lines partly within the State, is not in conflict with the interstate commerce clauses of the Federal constitution, nor with the Act of Congress of July 24, 1866, already set out.⁴ One of the departments of the Supreme Court of New York is also reported to have held that the fact that the Act of Congress already set out,⁵ has made it *possible* for a telegraph

¹ *Charleston v. Postal Telegraph Co.*, 9 Rail. & Corp. L. J. 129.

² *Philadelphia v. Western Union Tel. Co.*, 40 Fed. Rep. 615; s. c., 2 Inters. Com. Rep. 728.

³ *Western Union Tel. Co. v. Commonwealth*, 110 Pa. St. 405; s. c., 20 Atl. Rep. 6 (*Anno* 1885).

⁴ *Ante*, § 2.

⁵ *Ante*, § 2.

company, created under general State laws, to establish business relations with the Federal government will not, without proof that such relations have been formed, justify a legal *presumption* that the line extends beyond the limits of the State, and that the company has assumed such relations with the United States as to deprive the State of the right to tax its property within the State.¹ But, as already seen,² telegraph companies which have accepted the provisions of the Act of Congress cannot be taxed by a State for any messages or receipts arising from messages from points within the State to points without, or from points without the State to points within; but such taxes may be levied upon all messages carried and delivered exclusively within the State.³

§ 521. **Leasing Line and Breach of Contract for Continuous Business.**—A contract between a telegraph company and an individual, by which he agrees to provide an office and to transact business for that company exclusively, and the company agrees to furnish instruments and other office supplies, and not to open another office in the place during the continuance of the contract, which, it is expressly agreed, shall continue for ten years, with a provision that either party may break the contract by paying in cash a sum equal to the amount that would have been received by the agent if it had been carried out, to be estimated according to his

¹ *Western Union Tel. Co. v. Tierney*, 57 Hun (N. Y.), 357; s. c., 32 N. Y. St. Rep. 605; 10 N. Y. Supp. 940; *Same v. Same*, 32 N. Y. St. Rep. 608; 10 N. Y. Supp. 948.

² *Ante*, § 6.

³ *Western Union Tel. Co. v. Alabama State Board of Assessment*, 132 U. S. 472; s. c., 33 L. ed. 409; 30 Am. & Eng. Corp. Cas. 583; 2 Inters. Com. Rep. 726; 10 Sup. Ct. Rep. 161.

average yearly cash receipts, is broken by the company when it has leased its line, and when the company which has acquired the lease discontinues business at that office.¹

¹ Tufts v. Atlantic Tel. Co., 151 Mass. 269; s. c., 23 N. E. Rep. 844.

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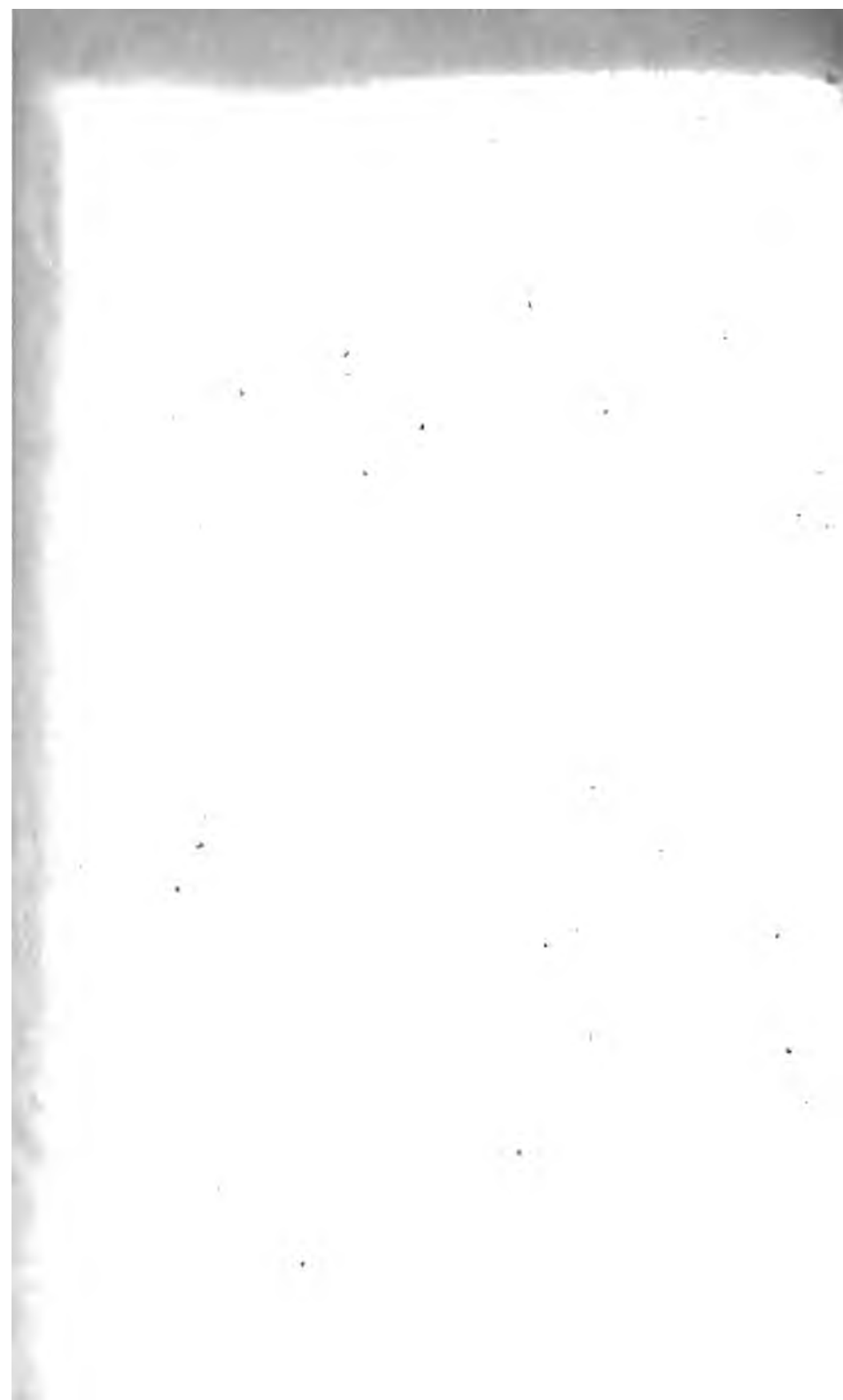
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